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PLEADING AND PROOF AT COMMON LAW.

H. A. Hollond.

FEW laymen know that the expression 'the pleadings' in an action denotes the written allegations of fact which each party is required to communicate to his opponent before trial, in order that each may know what contentions he will have to meet, if possible, by evidence, and that an issue, or issues, of fact or of law may emerge. This unexpected meaning comes down in direct descent from the Middle Ages, when opposing counsel strove in Court to extract an issue from the conflicting pleas (*placita*) submitted by them orally.[1]

Thirteenth century.

During the earlier part of this century proof was formal and the function of the Court was to declare which of the parties must go to proof and how. In certain classes of cases proof by battle was appropriate, in others proof by oath—either the oath of the party, supported by oath-helpers, or the oath of witnesses.[2]

In trial by battle the prosecutor offered battle, in certain cases by his own body, in others by his champion. The weapons are described as *baculi cornuti*, *bastons cornuz*: their character is uncertain. The burden of proof was on the combatant who

[1] This brief outline of a very complicated historical story is based on the account given by Maitland in Pollock and Maitland, History of English Law (cited as P. & M.), Vol. II, and by Sir W. S. Holdsworth in his History of English Law (cited as H.), Vols. I, III, VI and IX. Sir William's work is so comprehensive that an elementary presentation of the history of any legal topic must necessarily draw on the stores of his massive learning. Almost all the information here summarized has been given by him in greater detail.

[2] P. & M. II, 602.

fought for an affirmative proposition (generally the plaintiff); his adversary won if the stars appeared before the fight was over.[3]

In proof by oath with oath-helpers, wager of law, the party called upon to prove took the oath, and the helpers swore that the oath was true to the best of their knowledge, being thus witnesses as to the character of the swearer and the credibility of his oath. Often the number of helpers was twelve, but in some cases fewer, in others more, were demanded. A punctilious regard for formalities was required of the swearers. If a wrong word was used the oath 'burst', and the adversary won. This method of trial remained theoretically available in the actions of debt and detinue until 1833. In the seventeenth century it was still a reality. One of the arguments in *Slade's Case*[4] against allowing *assumpsit* to be used by a plaintiff to whom *debt* was available was that the defendant would be unjustly deprived of the privilege of waging his law. The Court disposed of this argument with the answer that 'the mischief would be rather on the other party, for now experience proves that men's consciences grow so large that the respect of their private advantage rather induces men (and chiefly those who have declining estates) to perjury: for *iurare in propria causa* (as one saith) *est saepenumero hoc seculo praecipitium diaboli ad detrudendas miserorum animas ad infernum*'.

Proof by oath of witnesses was different. The oath was by a suit (*secta*) of witnesses who claimed to know something about the facts. In the older procedure the oath was probably formal, and if the witnesses only pronounced the requisite words the opponent was vanquished. But in the thirteenth century the witnesses could be examined by the Court as to whether they really knew anything. If they were found to know nothing or to disagree, the suit was null and the party producing the suit failed.

An action having been begun by a writ, and the parties having come to Court, proceedings opened with the pleadings. All pleading was oral, but a plea once uttered was recorded on the roll of the Court. The statement made by the plaintiff's pleader was called his *tale*, Latin *narratio*, French *conte*. In later days it was called the *declaration*. It was a 'formal statement bristling with sacramental words, an omission of which would be fatal. . . . The plaintiff's count must not depart by a hair's breadth from the writ or there will be a "variance" of

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[3] P. & M. II, 632. In the appeal of felony the combatant was the prosecutor, in the writ of right a champion offered by the demandant.

[4] 1602, 4 Coke 92b.

which the defendant will take advantage. On the other hand, the brief statement that the writ contains must be expanded by the count. Thus a writ of *debt* will merely tell William that he must say why he has not paid fifty marks which he owes to Alan and unjustly detains; but the count will set forth how on a certain day came this William to this Alan and asked for a loan of fifty marks, how the loan was made and was to have been repaid on a certain day, and how, despite frequent requests, William has refused, and still refuses, to pay it.' [5]

At the same time the plaintiff had to offer the appropriate proof.

Then came the defendant's turn. During the earlier part of the century the only plea available to him was a flat denial, called 'defence', because in medieval Latin *defendere* meant alternatively 'to protect' and 'to deny'.[6] He probably desired that 'the proof' should be awarded to him rather than to the plaintiff. So he offered to make good his denial by an appropriate mode of proof. The Court thereupon ordered how proof should be made.

In the middle of the thirteenth century the notion of the *exceptio* borrowed from Roman law made headway. It is the ancestor of the special plea. At first exceptions were in the nature of preliminary objections, such as that the defendant is not bound to answer because the plaintiff is an outlaw. But soon the range of the *exceptio* increased so as to embrace objections of every kind to the validity of the plaintiff's claim. The party 'excepting' was required to offer to prove his case. Perhaps he could rely on the record of a Court or on a charter; but in general the modes of proof open to him would be a 'suit' of witnesses, or in some cases a single witness ready to do battle.[7]

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[5] P. & M. II, 605.

[6] The record of pleading of the defendant to a writ of right states '*et venit X et defendit jus suum*'. This is very puzzling to a classical Latinist. It seems to mean 'and X comes and defends his title'. It does in fact mean 'and X comes and denies his (the plaintiff's) title'.

The formula of denial is the Anglo-Saxon thwert-ut-nay.

Thwert is a word of Scandinavian origin meaning 'transverse', 'cross'; '*ut*' = 'out', cp. 'out and out', 'utterly'. Miss A. J. Robertson, Lecturer in English in the University of Birmingham, informs me that one *Orm*, writing about 1200 a book which he calls the *Ormulum*, frequently uses '*trowenn thwertut*' 'to believe utterly', and '*forrwerrpenn thwertut*' 'to reject utterly'. One who says '*thwert-ut-nay*' therefore meets a statement with a reinforced negative, as a modern might do by saying 'emphatically no'. The *N.E.D.* cites a charter of 1277 given by Edmund, brother of Edward I, to the borough of Leicester. That charter modified the procedure of the Court of Portmanmote in the borough, where the past practice had been to treat as undefended a defendant who, immediately upon the plaintiff's stating his claim, did not say 'thwert-ut-nay': J. C. Jeaffreson, Index to MSS. of Leicester, p. 74.

[7] The *exceptio* could be met by a *replicatio*, the latter by a *triplicatio*, and so on *ad infinitum*: P. & M. II, 615.

But even after it became the practice for the gist of the defendant's answer to be stated in the form of an *exceptio*, it remained necessary to preface the defendant's plea with formal words of denial. These formal words were still in use in the eighteenth and early nineteenth centuries, and were still called 'the defence'. And it was not until 1698 that the Common Pleas came round to the view, which was already that of the King's Bench, that the omission of the 'defence' was not fatal to the defendant.[8]

In connexion with the *exceptio* the assize of novel disseisin and other possessory assizes offered an opportunity for the introduction of an innovation of far-reaching importance. When a question of the right to possession of land was being tried by petty assize there were present in Court twelve good and lawful men who had been summoned as directed in the writ, for the purpose of answering, as recognitors, the question whether the alleged wrongful taking of possession had occurred. What more effective method could there be of getting an answer to the question raised in an *exceptio* than that of referring it to the recognitors? This method could hardly be objected to by the plaintiff, who had himself invoked it. And so the judges were not loth, when a party raised a question in pleading and offered to submit it to the recognitors, to make such submission compulsory. In these cases it was said that *assisa vertitur in iuratam.* When once this example had become established it became the practice in other actions for a party to offer submission to a *iurata* (jury) as the method of proof of an 'exception', and for the opponent to accept it. *Et inde ponit se super patriam* (and thereon he places himself upon the country), says the record, *et alter similiter* (and the other does the like).[9]

The fourteenth and fifteenth centuries.

There was a tradition that in the fourteenth century the art of pleading was at its best. Coke wrote: 'In the reign of Edward III pleadings grew to perfection both without lameness and curiosity . . . and therefore truly said that reverend justice Thirning, in the reign of Henry IV, that in the time of

[8] H. IX, 283.

[9] By the end of the thirteenth century the verdicts of jurors had practically ousted the older methods of proof. Maitland examined the records of the civil causes before the justices in eyre at Newcastle in 1256, 1269 and 1279. He found Verdicts of Grand Assizes 1, Verdicts of Petty Assizes 57, Verdicts of Juratae 22, Wagers of Battle 0, Wagers of Law 1: P. & M. II, 641. In the fourteenth century archaic methods of proof, though not expressly abolished, disappeared, except wager of law in debt and detinue.

Edward III the law was in an higher degree than it had been any time before; for (saith he) before that time the manner of pleading was but feeble in comparison of that it was afterward in the reign of the same king.' So too Hale: 'The judges and pleaders were very learned and the pleadings are somewhat more polished than those in the time of Edward I. Yet they have neither uncertainty, prolixity, nor obscurity. They were plain and skilful . . . so that at the latter end of this king's reign the law seemed to be near its meridian.' [10]

The pleading was in the Law French of the Year Books.[11] As the use of English had spread and knowledge of French had correspondingly decreased, an attempt was made in 1362 to alter the practice. It was enacted that all pleas pleaded in the king's Courts or in any other Courts 'shall be pleaded, shewed, defended, answered, debated, and judged in the English tongue, and that they be entered and inrolled in Latin'. Except for the inrolment in Latin, which was the existing practice and continued until it was abolished by statute in 1731, the statute of 1362 was disregarded and lawyers continued to use Law French, debasing it as time went on with a considerable admixture of English words. In the seventeenth century the use of English increased as the Common Law absorbed new branches of law to which Law French was not appropriate. There was a revival of Law French after the Commonwealth, and Roger North (who died in 1734) regarded a knowledge of it as indispensable. Lawyers ceased to be familiar with it after the statute of 1731 enacted that the proceedings of the Courts should be in English.[12]

In the fourteenth century pleading was still in all cases oral, normally by counsel, but if the plaintiff was a poor man the Court would itself speak the declaration for him, and the defendant would then be required to answer.[13]

In the fifteenth century pleadings grew much longer and, in the words of Hale, 'the pleaders, yea and the judges too, became somewhat too curious therein. So that that art or dexterity of pleading, which in its use nature and design, was only to render the fact plain and intelligible, and to bring the matter to judgment with a convenient certainty, began to degenerate from its primitive simplicity, and the true use and end thereof, and to become a piece of nicety and curiosity.' [14]

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[10] Co. Litt. 304b; Hale, History of the Common Law, 6th ed. 198.

[11] There is a grammar of this language in Maitland's introduction to Y. B. 1 & 2 Edw. II, Vol. I7 of the Selden Society.

[12] H. VI, 494, 572.

[13] Y. B. 11 & 12 Edw. III (R. S.) 66; H. III, 647.

[14] Hale, H. C. L. 212.

This growth of technicality made it impossible for the system of oral pleading to continue unchanged, for counsel could not be expected to compose *ex tempore* a plea possessing the formal precision required. So the Court did not treat as conclusive anything said by counsel unless it was entered on the roll, and even then in suitable cases it assumed power to give leave to amend the pleading after enrolment. And the next stage probably was that 'it became the practice for counsel to enter the declaration or plea upon the roll in the office of the prothonotary [15]; that the counsel of the other party had access to it in order to concert his plea, or take his exceptions to it; and that when these were to be argued the roll was brought into court as the only evidence of the pleading to be referred to'. This conjecture was made by Reeves, writing about 1785, and is approved by Sir William Holdsworth. Reeves went on to conclude that this course 'led to the expedient of putting the pleadings into paper, and handing this paper from one party to the other, the entry on the roll being deferred till the end of the term, an improvement which greatly facilitated the perusal and correction of pleadings, both of the party and his adversary, and made the affair of amendments more easy and decorous than in the old method, which must deface the roll. But this could not be indulged in till a period arrived in which so useful a commodity as paper was become cheaper and more common.' [16]

It appears from a *dictum* of Chief Justice Prisot in a Year Book case of 1460, cited by Sir William Holdsworth, that at that time it was the practice of the Court to admit a paper pleading put in by a party who was not represented by counsel. That case [17] is the first hitherto noted in which a paper pleading

[15] This title (preignotary is the law-French form of it) was borne by one of the officials of the King's Bench and three of the officials of the Court of Common Pleas. The title was abolished by the Superior Courts (Officers) Act, 1837, which created the modern Masters.

[16] John Reeves, Fellow of Queen's College, Oxford, a commissioner of bankruptcy, wrote a History of English Law, which he published in 1787. This passage is taken from pages 621-2 of Vol. II of the 3rd edition. Part of it is quoted by Holdsworth in H. III, 643-4.

[17] Y. B. 38 Hen. VI, Pasch. pl. 13; H. III, 646. The action was upon a writ of right. The tenant (as the defendant in such actions was technically called) had made default at *nisi prius*. In the Common Pleas the demandant's counsel, Billing and Laicon, prayed judgment. The tenant requested his counsel, Serjeants Choke and Littleton, to plead the fact that while on their way to the trial at *nisi prius* he and his attorney had been held up by floods. The serjeants, not feeling convinced of the truth of this statement, refused to plead it. Whereupon the tenant, says the Year Book, 'ala a Cumberford protonotary et pria que il voille faire a luy papier de ceo matter; le quel fait issint; et puis il vient ove le papier et la prist a Choke a le barre, et lui pria pur gette ceo en le court, et issint il fist per son commandement sans pleder ou sans veier que fuit deins le papier, et cest papier demourt ove Copley un auter protonotary pur ceo que il avera l'entrie de le matter a devant.' 'He went to Cumberford, the prothonotary, and prayed him to make him a paper upon this matter, which he did;

is mentioned. In it the discussion reported is on the question whether the Court would admit a paper pleading of a fact which the party's counsel had refused to plead orally. Moile J. expressed sympathy with a client whose counsel refused to plead matter which their client requested them to plead, and added, 'que poit il donques faire, mes va al' protonotary et faire un papier et le mist eins pur son excuse, n'ad il donques bien fait'. Eventually it was settled that the plea be recorded in the manner and form in which it was drawn, without any amendment.[18]

Sixteenth and seventeenth centuries.

During the earlier part of this period it seems clear that pleadings were put in partly in writing and partly orally. The Year Books of this time[19] differ from those of earlier date in that they record the argument of questions as to the effect of pleadings already settled rather than of the question what pleas each party shall be required to stand by and so what form the issue should take.[20] In the *De republica Anglorum*, posthumously published in 1583, Sir Thomas Smith, first holder of the Regius Professorship of Civil Law founded at Cambridge by Henry VIII, wrote[21] that the judges 'hear the pleading of all matters which do come before them: and in civil matters where the pleading is for money, or land, or possession, part by writing and part by declaration and altercation of advocates the one with the other, it doth so proceed before them till it do come to the issue, which the Latins do call *statum causae*'.

The growth of written pleading at the expense of oral

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then he came with the paper to Choke at the bar, and prayed him to put it in to the court, and he did so by his command without pleading it or seeing what was in the paper; and the paper remained with Copley, another prothonotary, because he had the entry of the matter before.'

Billing and Laicon moved for judgment, calling attention to the suspicious character of the plea. Prisot C.J. supported their contention, saying to Choke and Littleton: 'It is not the practice to put in such papers when the party is represented by counsel without pleading them at the bar openly; for if this be allowed we shall have several such papers in time to come which will come in under a cloak, and matter which a man's counsel will not plead can be said to be suspicious.' Then he said to them, 'if you wish to plead this matter, plead it, or otherwise it will be good for nothing'. And they replied that they dared not plead this matter, knowing nothing of it except what the tenant told them; and they said that they did not wish to meddle any further with it.

[18] Another proof of the fact that at this time prothonotaries or their clerks put into shape the pleadings of persons not represented by counsel is an order made by Prisot C.J. and the other judges of the Common Bench in 1457 as to the fees payable to prothonotaries. A fee of 13s. 4d. was paid when the litigant appeared in person or by attorney, as compared with one of 2s. when the plea was pleaded by a serjeant: H. III, 646.

[19] The series came to an end in 1535.

[20] H. III, 649.

[21] Bk. 2, c. 13, cited H. III, 649. Smith was Secretary of State in the reigns of Edward VI and Elizabeth: *b.* 1513, *d.* 1577.

pleading, until it completely supplanted the latter, was probably influenced by the fact that in the Chancery and in the Star Chamber in the sixteenth century the pleadings (as well as the evidence) were written. It was further accelerated by the development of the practice in the Common Law Courts of proving facts by the testimony of witnesses, given in Court. Before this time the prevalence of false accusations and perjury had led to the enlargement of the offences of maintenance and conspiracy to such an extent that it was dangerous to offer oneself as a witness. But under the Tudors, who encouraged witnesses for the Crown, the practice of calling witnesses in all classes of cases became general, and Coke, in a chapter on perjury,[22] wrote that most commonly juries are led by the deposition of witnesses.

A little later than the middle of the seventeenth century it had become recognized that it was the function of the jury not to inform itself privately, like the recognitors of old, but to draw conclusions as to the facts of the case from evidence given orally before it. In a case in 1650 it was said by the Court that if either of the parties to a trial desire that a juror may give evidence of something of his own knowledge to the rest of the jurors, the Court will examine him openly in Court upon his oath, and he ought not to be examined in private by his companions.[23]

As the nature of jury trial changed, its centre of gravity shifted. The medieval functions of counsel with regard to the pleadings passed mainly into other hands and were replaced by the modern duties of examining and cross-examining witnesses, and of addressing the Court on the subject of the credibility and the significance of their evidence, as well as upon questions of law. The pleadings were in every instance put into writing and exchanged between the parties before the trial. Only in the case of real actions was there a relic of the old practice. 'When causes, which they call real, come on, and require counting, and pleading at the bar, it is done for form, and unintelligibly; and whatever the Serjeant mumbles, it is the paper book that is the text.'[24]

The transformation of oral into written pleadings and the assumption of new functions by counsel were naturally followed

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[22] Third Institute, p. 163, cited H. I, 335.

[23] *Bennet* v. *Hundred of Hartford*, Style 233, cited H. I, 336. Cf. the later cases of *Duke* v. *Ventris* (1656) Duncomb, Trials per Pais, c. 12 (no further reference) and *Fitz-James* v. *Moys* (1664) 1 Siderfin 133.

[24] Lives of the Norths, I, 30, cited H. III, 655. These biographies, by the Hon. Roger North, were first published in 1740 and 1742.

by a demand for, and a supply of, books of precedents and specialists in draftsmanship.

The books of precedents were called *Books of Entries*, *Libri Intrationum*, because the pleadings were put into the form in which they would in due course be entered on the roll, in the third person and in Latin. After two anonymous ones, in 1510 and in 1546, came the most famous of them, *Rastell's Entries*, in 1564.[25] Rastell tells us about his construction of the book as follows: 'And understand this good reader that all the notes and referments, and all that is in the French in this book, and all the words in the margent, be mine and of my study. But none of the declarations, pleadings . . . and precedents that be in Latin in this book, be of my making and compiling. For all of them (except a few which I gathered together when I was a prentice of the Law, Serjeant and Justice) have I taken and gathered out of four several good books of precedents. First, the old printed book of Entries, the second, a book of precedents of matters of the Common Pleas, diligently gathered together, and written by Master Edward Stubbis, that was one of the Prothonotaries of the Common Pleas, the third a book of good precedents of the King's Bench, written and gathered by John Lucas, secondary[26] to Master William Roper, Prothonotary of the King's Bench, the fourth a book of good precedents which was my grandfather's, Sir John More, sometime one of the Justices of the King's Bench (but not of his collection). And all the precedents that be in all these four books have I collected into this book.'

The following are precedents taken from the title 'Trespass'[27]:—

Count de assault et baterie. [Declaration: assault and battery.] R. M., J. M., et W. M., attachiati fuerunt ad respondendum H. B. de placito quare vi et armis in ipsum H. apud W. [the place] insultum fecerunt, et ipsum verberaverunt, vulneraverunt et maletractaverunt, ita quod de vita eius desperabatur, et alia enormia ei intulerunt, ad grave damnum ipsius H., et contra pacem domini Regis nunc *etc.* Et unde idem H. per W. H. attornatum suum querit quod predicti R. J. et W., in festo sancti Johannis Baptistae, anno *etc* vi et armis, videlicet gladiis, arcubus et sagittis in ipsum H. apud W. insultum fecerunt, et ipsum verberaverunt, vulneraverunt, et maletractaverunt, et alia enormia *etc*

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[25] William Rastell was a son of the publisher of that name, and a nephew of Sir Thomas More. He was a Catholic and became a judge of the Court of Queen's Bench under Mary. He retained office under Elizabeth till 1563, when he resigned. He died in 1565. This passage from his preface is quoted H. V, 385, note 2.

[26] Each of the three prothonotaries of the Common Pleas appointed a secondary: H. I, 260.

[27] P. 611.

ad grave damnum *etc* et contra pacem *etc* unde *etc* ad valentiam xxx Li. Et inde producit sectam *etc.*

Barre de son assault demesne. [Plea in bar: self-defence against the plaintiff's own assault.]

Et praedicti R. M., J. M., et W. M., per J. N. attornatum suum, veniunt et defendunt vim et injuriam quando *etc* et quoad venire vi et armis non culpabiles etc. Et de hoc ponunt se super patriam, et praedictus H. similiter. Et quoad residuum transgressum praedictum superius fieri suppositum, iidem R., J. et W. dicunt, quod praedictus H., eisdem festo et anno, apud W. praedictum, in ipsos R., J. et W. insultum fecerunt, et ipsos verberasse, vulnerasse, et maletractasse voluit, per quod iidem R., J. et W., adtunc ibidem seipsos erga prefatum H. defenderunt, et dicunt quod damnum si quid eidem H. adtunc et ibidem evenit, hoc fuit de insultu ipsius H. proprio, et in defensione ipsorum R., J. et W. Et hoc parati sunt verificare, unde petunt iudicium si praedictus H. actionem suam praedictam adversus eos habere debeat *etc.*

Replication de son tort demesne et sans tiel cause, et issu sur ceo. [Replication to the effect that the defendants' plea of self-defence is untrue: thereupon issue to the jury.]

Et praedictus H. dicit quod ipse precludi non [debeat], quia dicit quod praedictus R., J. et W., die et anno supradictis, vi et armis *etc* de iniuria sua propria, absque causa per ipsos R., J. et W. superius allegata, in ipsum H. apud W. praedictum insultum fecerunt et ipsum verberaverunt, vulneraverunt et maletractaverunt, ita quod de vita eius desperabatur, contra pacem domini Regis nunc, prout ipse adversus eos queritur. Et hoc petit quod inquiratur per patriam, et praedicti R., J. et W. similiter.

The practice of drawing the pleadings in Latin continued, with a brief interval during the Commonwealth, until the enactment in 1731 of the statute already referred to. Even then many eminent lawyers regretted the reform. Sir James Burrow, in the preface to his Reports, wrote: 'A statute now took place for converting them [common-law pleadings] from a fixed dead language to a fluctuating living one; and for altering the strong solid compact hand (calculated to last for ever) wherein they used to be written [he was referring to Court hand] into a species of handwriting so weak, flimsy, and diffuse that . . . many a modern record will hardly survive its writer, and few perhaps will survive much above a century.' [28]

The answer to the question who drew the written pleadings depends on the date referred to. In two chapters added to Smith's Republic in the edition of 1589 it is stated that as

[28] The statute 4 Geo. 2, c. 26 directed that all pleadings, rules, orders, . . . records, judgments, statutes, . . . rolls, entries, fines and recoveries . . . and all proceedings in any Courts of Justice . . . should be in the English tongue and language only, and not in Latin or French, or any other tongue or language whatsoever.

regards the Common Pleas 'the prothonotaries are they which after the parties have appeared in court, do enter the matter in suit, and make the pleadings and enter them', and as regards the King's Bench 'there are certain attornies belonging to this Court in number as the prothonotary shall appoint: those are for plaintiffs and defendants in every cause, and they frame and make the pleadings'.[29] Later, in the seventeenth century, the business of the Courts increased to such an extent that the officials of the Courts allowed the work of drawing pleadings to be done by the attornies of the parties.[30] But counsel did not cease entirely to be concerned with the pleadings, for in 1666 the King's Bench ordered that special pleas and demurrers should have a counsel's hand to them, while in the Common Pleas a serjeant's hand was required.[31]

How far this order ensured a more than nominal responsibility on the part of counsel does not appear. It was in force till the Common Law Procedure Act, 1852, but H. J. Stephen wrote in 1824 that counsel's signature had long been a matter of form.[32] Actually there had grown up a body of experts called 'special pleaders' who drew any pleadings that presented difficulty. Sir William Holdsworth conjectures that the earliest special pleaders were persons who, having been clerks in a prothonotary's office, had abandoned an official career and had become members of an Inn of Court, but had not been called to the Bar. The profession of special pleader was during the eighteenth century, and a large part of the nineteenth, a flourishing one, and those who followed it, together with equity draftsmen and conveyancers, constituted a class of lawyers who were members of the Inns of Court but 'practitioners under the bar'.[33] This class has ceased in practice to exist, but has not, up to the present, been formally abolished.

Eighteenth and nineteenth centuries.

Throughout the history of pleading the standard of verbal accuracy exacted was extreme. To mitigate its rigour there were passed between 1340 and 1718 eleven statutes of *Jeofail*, so called because in prescribed classes of cases a pleader saying *Jeo faille* was allowed to amend his error. But only the surface

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29 Quoted H. III, 651, note 1.
30 H. III, 652; VI, 445.
31 H. VI, 445—446.
32 H. VI, 445, note 11. H. J. Stephen, 1787—1864, St. John's College, Cambridge, author of a treatise entitled Pleading, first published 1824, and of Stephen's Commentaries. He is said to have refused a judgeship on account of unwillingness to pronounce death sentences.
33 H. VI, 446.

of the evil was touched. For instance in 1819 [34] a plaintiff lost his case on account of a 'variance', because in an action for malicious prosecution he had 'declared' that the defendant had falsely charged him before Baron Waterpark of Waterfork, Waterfork being miswritten for Waterpark. And in the following year defendants, who were relying on the Statute of Limitations, failed because, instead of pleading in the usual form that the cause of action did not accrue within six years, they had pleaded that they were not guilty within six years.[35]

The danger to plaintiffs led to their declaring their cause of action in a series of alternative counts. In 1830 the Common Law Commission reported [36] that records containing from ten to fifteen special counts or pleas were by no means rare, and that this multiplication led both to expense and to the presentation of the case in such complex form that the trial was often embarrassed and protracted.

The danger to defendants was met by the practice of 'pleading the general issue'. On this subject Blackstone wrote as follows [37]: 'The science of special pleading having been frequently perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves everything open, the fact, the law and the equity of the case; and have allowed special matter to be given in evidence at the trial. And though it should seem as if much confusion and uncertainty would follow from so great a relaxation of the strictness anciently observed, yet experience has shown it to be otherwise, especially with the aid of a new trial, in case either party be unfairly surprised by the other.'

The general issue was a plea directly traversing (*i.e.* denying) the whole declaration. In trespass the plea was not guilty, in *assumpsit*, *non assumpsit*.[38] Logically the latter

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[34] *Waller* v. *Mace*, 2 B. & Ald. 756, before Abbott C.J. (Lord Tenterden), Holroyd and Best JJ. The Court also held a count for slander bad because the words laid were: '*this* is my umbrella, and he stole it from my back door', whereas the defendant was proved to have said: '*it* is my umbrella, and he stole it from my back door'.

[35] *Dyster* v. *Battye*, 3 B. & Ald. 448: H. IX, 285. In this case the defendants were given leave to amend on payment of costs.

[36] Second Report, p. 34.

[37] Commentaries, III, 305.

[38] It is interesting to detect in the form of pleading the general issue current in the early nineteenth century the relic of the *thwert-ut-nay*. *E.g.* in an action of trespass the plea of a defendant denying *in toto* the plaintiff's allegation was: 'And the said *C D* comes and defends the force and injury when etc. *and says* that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in manner and form as the said *A B* hath above complained. And of this the said *C D* puts himself upon the country.' In this statement the words preceding '*and says*' (technically called 'the defence') are the descendant of

plea should only have been used when the defence was that a contract had never been made, actually it was possible to set up under that plea a subsidiary defence which ought to have been specially pleaded, such as payment, usury, gaming, infancy, accord and satisfaction, release, coverture.

The general issue did involve certain evils which were pointed out by the Common Law Commissioners.[39] It caused the expense of collecting for the trial witnesses whose evidence would turn out to be unnecessary. It caused questions of law, instead of their being developed, by way of demurrer, for adjudication by the full Court *in banc*, to come before a single judge at *nisi prius*; 'and their decision, upon his sole authority, deprived as he generally is of the advantages of any previous intimation of the matter to be argued, and unable to refer to books, is often found to be unsatisfactory and inconclusive.' There were consequently an enormous number of motions for new trial.

To cure these defects the Common Law Commissioners, largely influenced by H. J. Stephen, who was one of them, made the following recommendations[40]:—

(1) Several counts not to be allowed unless a several cause of action is intended to be established in respect of each: several pleas not to be allowed unless a several ground of defence is intended to be established in respect of each.

(2) In cases of immaterial variance the judge to have power to direct an amendment *instanter*, and proceed with the trial forthwith.

(3) In cases of a variance which is such as to mislead the opposite party, but not such as to destroy the right of action or defence, the judge to order the record to be withdrawn, with the result that the trial must be adjourned to enable the opposite party to prepare himself afresh.

(4) To abolish the right to plead the general issue in the majority of cases.

These recommendations were carried into effect by the *Regulae Generales* of the Hilary Term, 1834, commonly called the Hilary Rules, which were issued by the judges under Parliamentary authority.

The rule which restricted the use of the general issue was an utter failure. The Commissioners had not realized that special

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the *thwert-ut-nay*, and the words subsequent, technically called 'the plea', are the descendant of the *exceptio*. Note the archaic use of the word 'defends', and the use of 'when etc.' to represent the words 'when and where it shall behove him, and the damages, and whatsoever else he ought to defend'.

[39] Second Report, pp. 44-7.

[40] Second Report, pp. 85—90.

pleading would often result in a decision of the action without reference to its merits and in an undue prolongation of the proceedings by objections and appeals on questions of form. During the years 1830—1846 every fourth case decided a question on the pleadings.[41] But in spite of criticisms by the Common Law Commissioners of 1851, and minor improvements in the Common Law Procedure Acts, nothing substantial was done until the Judicature Acts, 1873-5.

The Rules of Court[42] made in pursuance of the Judicature Act radically changed the character of pleading. The parties must now plead the facts on which they intend to rely, and not the legal conclusions which they put upon those facts. The pleadings are not bound to be in any particular shape, provided that they contain a clear and concise relation of the material facts necessary to a decision.[43] And liberal powers of amendment have been given to the Court.

The change effected by the Judicature Act may be studied by comparing the third edition of Bullen and Leake's Pleadings, 1868, with the fourth edition in 1881. In the preface to the latter it is stated that the alteration in the system of pleading, which requires material facts to be stated, instead of the legal result of those facts, has rendered necessary a re-drawing of the forms. The difference between the old style and the new is shown by the two following forms:—

Third edition, page 241, count used by a purchaser against a vendor for not delivering specific goods sold:

'That it was agreed by and between the plaintiff and the defendant that the defendant should sell to the plaintiff, and the plaintiff should buy from the defendant, one hundred sacks of flour at the price of £— per sack, to be delivered by the defendant to the plaintiff in a week then next following, and to be paid for by the plaintiff on delivery; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to the delivery of the said goods as aforesaid; yet the defendant did not deliver the said goods to the plaintiff, whereby the plaintiff has been deprived of the profits which would have accrued to him from the delivery of the same.'

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[41] An analysis was made by C. B. Whittier in Vol. 31, Harvard Law Review. He computed that reversals of decisions on questions of pleadings occurred in 1 case in 44 under the common law, in 1 case in 33 under the Hilary Rules, and in 1 case in 605 under the Judicature Act.

[42] These rules are printed, with commentary, in the Annual Practice, commonly called The White Book.

[43] In many of the simpler cases pleadings are dispensed with: Odgers, Pleading and Practice, 11th ed. 70.

Fourth edition, page 308, statement of claim for damages for failure to deliver goods contracted for:

'1. On the —— of —— 18—, the defendant by an agreement in writing agreed to sell and deliver to the plaintiff 50 tons of cotton seed pitch at the price of £2 5s. per ton, and the plaintiff agreed to accept and pay for the same.

2. The plaintiff has always been ready and willing to accept and pay for the same.

3. A reasonable time for the delivery of the said pitch has elapsed.

4. The defendant has not delivered the said pitch or any of it.

5. The market price of such pitch at the time when the defendant should have delivered the same was £5 per ton.'

This article will obviously not add anything to the knowledge of a well-read student. My excuse for writing it is that it is desirable that beginners should know the nature of pleadings and something of their history. Most of them, if unguided, have not time to venture into the larger books on legal history. I hope that this summary may encourage and help some to do so.[44]

[44] The history of written pleadings in modern times is treated fully by Sir W. Holdsworth in Vol. IX, 262—335. There are valuable articles on procedure in Vol. II of the Select Essays in Anglo-American Legal History, Camb. Univ. Press, 1908. Mr. Whittier, in the article previously cited, recommends two American books, Hepburn, The Development of Code Pleading, and Rosenbaum, Studies in English Civil Procedure.

A NEW APPROACH TO PRIVATE INTERNATIONAL LAW.

H. C. Gutteridge.

OUR English system of Private International Law has for some time past lent itself to accusations of insularity of conception and stagnation of thought. Dicey's famous work on the Conflict of Laws has threatened to develop into a comfortable niche in which our rules of jurisdiction and the choice of law would be able to dwell in cloistered seclusion undisturbed by criticism from within or by the infiltration of new ideas from without. English legal thought has, undeniably, been dominated for over a hundred years by two text-books. Story's Conflict of Laws reigned supreme until the beginning of this century when it was ousted by Dicey's treatise. Westlake's Private International Law, which in some respects is the most notable contribution which English writers have made to the development of Private International Law, never established itself in a like degree. The somewhat abstruse treatment of the subject by Westlake and his insistence on its comparative aspects involved a departure from current legal tradition which was not well received by the English legal public. Foote's Private International Law which at one time was held in great favour by practitioners was avowedly confined to an analysis of the English cases and as such contained within itself the germs of the obsolescence which has overtaken it. In any event, Dicey's Conflict of Laws was elevated by the Bench and the Bar to a pinnacle of authority which has seldom been attained by a text-book, and the rules in which Dicey stated his propositions have acquired a character which is almost sacrosanct. This exclusive reliance on the propositions of a single author is regrettable because Private International Law, as it exists in England, is for the greater part still in the making and the influence of Dicey's rules has been very much in the same direction as that exercised by a premature codification of a branch of the law which is in an undeveloped condition.

Nothing, however, is further from the writer's mind than the 'crabbing' of Dicey, even though this has been of late a some-

what favourite pursuit of legal critics. There can be no doubt as to the value of the services which Dicey rendered in breathing fresh life into his subject and in rescuing it from the bonds of slavish adherence to the learning of a bygone age. The fault lies not so much with Dicey himself as with the tendency to perpetuate the *ipsissima verba* of English legal treatises without regard to the question whether they have survived current development of the law or not. This may, and sometimes does, result in the preservation of a text which is out of date, coupled with a valiant effort to modernize it with the aid of elaborate footnotes and appendices. Nor does the matter rest there, because the editors of such treatises are apt to suffer from a sense of loyalty to their author which may in certain events lead to the stifling or 'toning down' of criticism. The process is exemplified in the latest editions of Dicey's Conflict of Laws. The exposition of current law is, in a great many instances, *e.g.* the doctrine of *Renvoi*, to be found not so much in the text itself, as in the appendices or in the admirable footnotes which reveal the learning, the legal acumen and the indefatigable powers of research which Professor Berriedale Keith has displayed in carrying out his task as Dicey's editor.

As a systematic guide to the English cases Dicey's work is likely to hold its own for some time to come. But it can no longer be regarded as all-sufficient. Dr. Cheshire has entered the field with a text-book[1] which must be regarded as inaugurating a new stage in the development of English Private International Law. He has succeeded in shaking himself free from the atmosphere of somnolence which was settling down over the subject and his inspiring book marks a new departure in the attitude of English lawyers towards the problems created by conflicts of jurisdiction and of law. He frankly recognizes that it may be doubted whether 'all is well with the English system of Private International Law', and we have at last got a work on the subject in which criticism receives full play combined with the recognition of the value of comparative research.

This, in itself, is a notable achievement, but it is not the only merit of Dr. Cheshire's book. As might be expected from the author of a very much appreciated treatise on the law of property, he has done what Dicey failed to do, namely, he has given us a clear, logical and much-needed exposition of the rules governing the transfer of movables and immovables, which—

[1] Private International Law, by G. C. Cheshire, D.C.L., M.A. Oxford: at the Clarendon Press. 1935.

certainly so far as the assignment of incorporeal movables is concerned—places the topic in an entirely new light. In fact, Dr. Cheshire and Dean Falconbridge (whose learned contributions to our knowledge of these very difficult questions are not so well known in England as they deserve to be) may be said to have appropriated this field to themselves in the current literature of the law. Particular mention may also be made of Dr. Cheshire's treatment of the repulsive subject of '*Renvoi*'. Taken as a whole it leaves nothing to be desired, though one may perhaps be allowed to doubt the accuracy of the somewhat meaningless statement that the application of the doctrine 'stultifies the private international law of the country by which it is applied'. The real objection, in practice, to the doctrine of *Renvoi* is that it so often involves both English and foreign judges in the almost impossible task of deciding which of the rival expert witnesses on foreign Private International Law is to be preferred, since *Renvoi* is the subject of acute controversy not only in England but also on the Continent. Dr. Cheshire's treatment of Domicil is admirable, though the writer finds it impossible to accept the contention that capacity to marry depends on the law of the matrimonial domicil. This view of the matter derives no adequate support from the authorities and would lead to somewhat strange results. It is to be hoped that the author will on mature reflection abandon this theory. The discussion of so-called 'commercial domicil' takes up space which is out of proportion to the very slight importance of this topic, and the writer thinks that he is not unfair to Dr. Cheshire if he says that the theory of a quasi-domicil of corporations leaves him unconvinced.

The least successful feature of the book is its treatment of the very important subject of jurisdiction. It consists, for the most part, of the enumeration of rules unaccompanied by any explanation of the problems which these rules have been designed to solve. Dicey's theories of 'effectiveness' and 'submission' are accepted without any critical examination of their merits, or of the extent to which they can be said to function in practice. Dr. Cheshire has been content to throw up his hands and to attribute the unsatisfactory state of our law on this matter to the empirical character of judge-made law. The scheme, under which he formulates the general principles of jurisdiction in Chapter III of the book and then takes up the thread again in Chapter XVII, is confusing to a student who is finally compelled to resort to Chapter XVIII, under the heading of 'Procedure', for certain matters, such as '*Lis Alibi Pendens*',

which are more important from the point of view of jurisdiction than that of procedure.

Dr. Cheshire's treatment of the topic of 'Qualifications' is disappointing. It is confined to a résumé of Mr. Beckett's very able article in the British Year Book of International Law for 1934, and no reference is made to the work which has been done in this connexion by Dean Falconbridge and Professor Lorenzen. Moreover, Professor Stone has pointed out that Dr. Cheshire is not always 'qualification conscious',[2] and one may, perhaps, be pardoned for thinking that the importance of this aspect of the conflict of laws has not yet been fully realized by the author in company with English lawyers in general, although Mr. Beckett, inspired by writers on the Continent, has emphasized the value of the comparative method of legal research in this and other directions so far as Private International Law is concerned.

One of the best chapters in the book is that which deals with the law of Contract. Dr. Cheshire has succeeded in rescuing the 'proper law' of the contract from the nebulous state in which it was left by Dicey, and it is now possible to use the phrase without doing too much violence to the circumstances in which a Court may be called upon to make a choice of law. The writer must, however, express his regret that Dr. Cheshire did not go still further and challenge the use of this phrase,[3] which is merely a cloak for the fact that our judges, assisted by certain presumptions, endeavour to ascertain how justice may be done having regard to all the circumstances of the case. This involves the consideration of the intention of the parties—nearly always in an objective sense—but only in so far as it appears that the contract and the circumstances in which it was made do not negative that intention. Would it not be preferable to abandon the phrase and to speak as Westlake does[4] of the law which is most closely connected with the contract? We should thus avoid the undue and unfortunate insistence on the intention of the parties which has been the result of Dicey's formula of the 'proper law'.[5]

To pass to questions of detail, Dr. Cheshire's view that a contract must be upheld as regards form and capacity, if it is valid by the proper law of the contract, has much to commend it, but it is not supported by authority and probably would not work so well in practice as a strict adherence to the maxim

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2 (1935) 49 Harvard L. R. at p. 169.

3 See Foster, Some Defects in the English Rules of Conflict of Laws (British Year Book of International Law, 1935, p. 84).

4 Westlake, Private International Law, § 212.

5 See, for instance, *The Adriatic* [1931] P. 241.

locus regit actum. This is, however, a highly controversial matter which cannot be dealt with in this place. It also seems to be doubtful whether Dr. Cheshire regards consideration as a matter of form or one of essential validity. *Re Bonacina* [1912] 2 Ch. 394 is cited under both headings. In discussing the effect of the failure to affix a stamp to a contract the *dictum* of Scrutton L.J. in *Republica de Guatemala* v. *Nunez* [1927] 1 K. B. at p. 691 has been overlooked by the author. The word 'available' in line 26 of page 178 must surely be a misprint, but the passage in which it occurs is obscure.

There are certain other matters on which Dr. Cheshire's views seem to be open to challenge. His criticism of *Machado* v. *Fontes* [1897] 2 Q. B. 231 is unconvincing. If the facts in that case are regarded in a realistic way it is impossible to contend that the defendant's conduct was innocent or that he had 'committed an excusable act'. It would be a strange result if an Englishman who in a foreign country publishes a libel concerning another Englishman can thereby save his pocket from the payment of damages. Dr. Cheshire's devotion to symmetry appears to have overcome his better judgment in this instance. Then again, his strictures on the rule which allows a foreign judgment to be impeached on the ground that it was procured by fraud also seem to ignore the realities of the situations which forced our judges to adopt this rule in such cases as *Vadala* v. *Lawes* (1890) 25 Q. B. D. 310 and *Ellerman Lines* v. *Read* [1928] 2 K. B. 144. Why, it may be asked, should the English Courts be compelled to become unwilling instruments in the perpetuation of a fraudulent act? As Professor Beale has pointed out, the rule is not necessarily in the nature of an attack upon the theory that an obligation results from a foreign judgment.[6] Moreover, so far as the writer is aware, the rule has not brought about any of the dire consequences adumbrated by Dr. Cheshire. In any event it has been embodied in the Foreign Judgments (Reciprocal Enforcement) Act, 1933,[7] and in the draft conventions with certain foreign countries arising out of the Act and was accepted without question by the foreign negotiators of at least one of the conventions.[8]

Finally, Dr. Cheshire's brief sketch of the attitude of Roman

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[6] Law Quarterly Review, Vol. 57 at p. 539.

[7] S. 4 (1) (iv). See also the Convention with Belgium (1934), Cd. 4168, Article 3 (e) and the draft Convention with Germany (Report of the Foreign Judgments Committee, 1932, Cd. 4213), Article 3 (c) (ii).

[8] *E.g.* Rapport de la Commission de la Législation Civile et Criminelle de la Chambre des Députés Chargée d'examiner le projet de loi portant approbation de la Convention pour l'exécution des jugements entre la France et la Grande-Bretagne (No. 5212 Quinzième Législature, Session de 1935).

law towards the conflict of laws is inadequate. It is based exclusively on the conclusions of Savigny and Lainé and ignores the results of modern research which tend to show that a choice of law was possible under the Roman system of a different kind to that envisaged by the authors upon whom Dr. Cheshire relies.

But the criticisms outlined above are largely matters of personal opinion and do not detract in any serious degree from the value of the book. 'Cheshire on Private International Law' has not only arrived, but has come to stay. It is unthinkable that any controversial point arising in an English Court can be discussed hereafter without reference to this very learned and inspiring treatise. Probably only those who, like the writer, are teachers of the subject can realize the difficulty of the task undertaken by Dr. Cheshire and rate at its true value the courage which he has displayed in facing the highly unsatisfactory state of English Private International Law at the present time. He has given us a work which is a masterpiece of compression. This makes it more accessible to students, but the writer ventures to think that this book, which is of outstanding merit, and is stamped with the impress of an unusually lucid and scholarly mind, deserves a better fate than relegation to the category of students' handbooks. A really satisfactory introduction to the subject for the use of students has still to be written, but Dr. Cheshire might well leave this task to others. The 'golden opportunity' of constructing a homogeneous and scientific body of Private International Law which Dr. Cheshire places before our judges should be seized by the author himself. Is it too much to ask that he should amplify the text and so establish his work as the definite authority on a subject of which he is a master and one which is steadily increasing in importance both from an academic and a practical point of view? The future of the subject in England lies largely in Dr. Cheshire's hands.

THOMAS v. *SAWKINS:* A CONSTITUTIONAL INNOVATION.

A. L. Goodhart.

ALTHOUGH the judgments in *Thomas* v. *Sawkins* [1] occupy less than three and a half pages in the Law Reports, it is a case of peculiar interest and importance. For the first time in English legal history it has been established that police officers are entitled to enter and remain on private premises if they have reasonable grounds for believing that if they are not present an offence or breach of the peace will be committed there. No case was cited by counsel or in the judgments in which it had been specifically held that the police had this power, and no text-book contains a statement that it exists or has ever existed. Apparently the Home Office was ignorant that this right, obviously so useful to the police, could be exercised by them, for when the Fascist meeting was held at Olympia in London on June 7, 1934, the police, although they had reasonable grounds for believing that breaches of peace would occur, did not enter the hall, because, in spite of their request, the organizer of the meeting refused to admit them. When, a week later, the situation was discussed in Parliament, the Secretary of State for the Home Department, Sir John Gilmour, said [2]:

> 'I want the House to understand that the law provides that unless the promoters of a meeting ask the police to be present in the actual meeting, they cannot go in unless they have reason to believe that an actual breach of the peace is being committed in the meeting.'

He added that if the police were to be armed with further power this would entail legislation. Two months later the Chief Constable of the county of Glamorgan proved that no such legislation was necessary, for he exercised the power which the Home Secretary had said did not exist, and the Divisional Court has now in the present case upheld his view of the law.

It is necessary to state the facts of the case at considerable length, for it concerns a branch of the law where the distinction

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[1] [1935] 2 K. B. 249.
[2] Parliamentary Debates (1933-34), House of Commons, Vol. 290, col. 1968.

between what is legal and what is illegal is often a fine one. The Caerau Library Hall was hired by one Fred Thomas for a meeting which the public were invited to attend to protest against the Incitement to Disaffection Bill, which was then before Parliament, and to demand the dismissal of the Chief Constable of the county of Glamorgan. When the respondent, a sergeant of police, and two other police officers, presented themselves for admission to the meeting, they were told that instructions had been given not to admit any police officers. Nevertheless, the officers entered the hall, and seated themselves in the front row. When the appellant Alun Thomas, whose previous meetings at other places in the county the police had also insisted on attending, arrived at the hall he requested the officers to leave, and when they refused to go, he went to the police station where he lodged a complaint and gave an undertaking that 'no breaches of the peace will occur if the police are immediately withdrawn'. On returning to the meeting, the appellant, after a further request which was refused, attempted to eject one of the officers, but the respondent pushed his arm away. The appellant thereupon preferred an information against the respondent under section 42 of the *Offences against the Person Act*, 1861, alleging that the respondent had unlawfully assaulted and beaten him. The justices at a Court of summary jurisdiction held that, as the police officers had reasonable grounds for believing that if they were not present at the meeting there would be seditious speeches and breaches of the peace would occur, they were therefore entitled to enter and remain at the meeting. It is important to note that no claim was made on the part of the police that this was an unlawful assembly or a riot at the time when they entered: they anticipated, however, that it might become so because of their experience at other Communist meetings. The justices dismissed the information and Thomas appealed. The Divisional Court (Lord Hewart C.J. and Avory and Lawrence JJ.) dismissed the appeal.

Before discussing the authorities on which the judgments were based two points as to the scope of the present case ought first to be considered, (1) does the principle of the case apply to all anticipated offences or only to breaches of the peace, and (2) does it apply to all meetings, whether public or private?

On the first point it will have been noticed that the police officers anticipated both seditious speeches and breaches of the peace, and that both offences are mentioned in the judgments. Would the police have been entitled to enter if they had merely

anticipated seditious speeches? This clearly may be an important practical question in the future, as meetings which may be seditious are not necessarily disorderly. On this point Lord Hewart C.J. takes the broad view that the power of the police is not limited to breach of the peace cases.[3] 'It seems to me', he says, 'that a police officer has *ex virtute officii* full right so to act when he has reasonable ground for believing that an offence is imminent or is likely to be committed.' Avory J. is even more explicit when he states that the police had reasonable grounds[4] 'for believing that, if they were not present, seditious speeches would be made and/or that a breach of the peace would take place. To prevent any such offence or a breach of the peace the police were entitled to enter and to remain on the premises.' The deliberate use of *and/or*, which, having been condemned by many purists, is rarely found in judgments, indicates that the learned judge intended to emphasize that it was not only the probability that a breach of the peace might occur which would entitle the police to enter private premises, but that they could do so if they anticipated other offences. Lawrence J., who limits his eight-line judgment to[5] 'the particular facts of this case', expresses no view on this point. Thus two of the three judgments may be cited as authority for the doctrine that the police are entitled to enter private premises because they reasonably believe that a speaker may make seditious remarks. This may lead to some curious results. May the Cambridge police insist on attending the lectures of such dons as they suspect may in the future express seditious opinions? Can they attend a gathering in a private room because they have reason to suspect those who are there?

This brings us to the second question whether the principle of the case applies to all meetings, whether public or private. Both Lord Hewart and Avory J. take the view that the invitation to the public to attend the meeting was a material fact in the case. Thus the Lord Chief Justice says that,[6] 'It seems somewhat remarkable to speak of trespass when members of the public who happen to be police officers attend, after a public invitation, a public meeting which is to discuss as one part of its business the dismissal of the Chief Constable of the county. It is elementary that a good defence to an action for trespass is to show that the act complained of was done by authority of law, or by leave and licence.' But, with all respect, it is

[3] At p. 255.
[4] At p. 256.
[5] At p. 257.
[6] At pp. 254, 255.

equally clear that even though an invitation to attend a meeting is phrased in general terms, the invitor is entitled to exclude any individual he may desire, and that an attempt to enter the meeting under such circumstances constitutes a trespass.[7] In the present case the fact that the dismissal of the Chief Constable was to be advocated at the meeting ought to have been sufficient indication to the police that they were not included in the general invitation even if they had not been specially told that their presence was unwelcome. The reference to entry by authority of law as negativing trespass is rather difficult to follow, for if, as the appellant claimed, the police officers had no such authority to enter the hall, then their entry must have constituted a trespass. If the police were entitled to enter after the invitation was withdrawn, it follows that they would have been entitled to enter even if no invitation had ever been given; nor can a distinction be drawn between a private meeting hall and other private premises, for the occupier of a hall has as much right to exclude a trespasser as has the occupier of a private house. Therefore, if the police are entitled to enter a private hall, as in the present case, it will not be possible to deny them an equal right when they demand entry into a private house. This is supported by the Lord Chief Justice's unqualified statement that a police officer may enter and remain[8] 'on private premises' when he reasonably believes that an offence will be committed there if he is not present.

What authority, overlooked both by the text-book writers and by the legal advisers to the Home Office, is there to support the present case, authority which obviously must be of great weight to warrant such a striking interference with the maxim that 'every man's house is his castle'? The Lord Chief Justice and Avory J. seem to base their arguments primarily on the analogy of the magistrate's power to bind a person over to maintain the peace. Thus after discussing *R.* v. *Queen's County Justices*,[9] *Lansbury* v. *Riley*,[10] and *Wise* v. *Dunning*,[11] Avory J. says[12]: 'In principle I think that there is no distinction between the duty of a police constable to prevent a breach of the peace and the power of a magistrate to bind persons over

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[7] Cf. cases cited in *Said* v. *Butt* [1920] 3 K. B. 497; Salmond, Torts, 8th ed. p. 262. In the case of a licence coupled with an interest, as *e.g.* if a ticket of admission has been purchased, then other considerations arise: *Hurst* v. *Picture Theatres, Ltd.*, [1915] 1 K. B. 1.

[8] At p. 255.

[9] (1882) 10 L. R. Ir. 294; 15 Cox C. C. 149.

[10] [1914] 3 K. B. 229.

[11] [1902] 1 K. B. 167.

[12] At p. 256.

to be of good behaviour to prevent a breach of the peace.' Is this analogy a valid one? In *O'Kelly* v. *Harvey* [13] (cited with approval by the Lord Chief Justice on another point) counsel attempted to draw this analogy when comparing the magistrate's power to disperse a meeting with his power to bind over, but Palles C.B. rejected it curtly [14]: 'The second class is of cases in reference to holding to bail to keep the peace and be of good behaviour, under the statute of Edward III. This latter class of cases is utterly without application to the matter in hand.' Without adopting the Chief Baron's robust words, it may be suggested that the binding-over cases are not directly in point and can be distinguished. The first and most obvious distinction is that this power has been given to the magistrates by statute [15] and that there is no statute giving such, or a similar, power to the police. It follows that, if the power of the police is to be based on analogy, a statute would be required in their case as it was in the case of the magistrates. This legislation, as Sir John Gilmour thought, would have to be made by Parliament and not by the Courts. The second distinction is one of principle, being based on the difference between judicial and executive power. When the magistrate binds a person over he is acting judicially, but when the police officer disperses a meeting he is acting in an administrative capacity. No one has emphasized the contrast between these more forcibly or eloquently than the author of The New Despotism [16]: 'But it is manifest that an opinion so arrived at differs by the whole width of the heavens from the decision of a Court. The work of a Court involves many important ingredients, as for example, (1) that the judge is identified and is personally responsible for his decisions; (2) that the case, subject to rare exceptions, is conducted in public; (3) that the result is governed by the impartial application of principles which are known and established; and (4) that all parties to the controversy are fully and fairly heard.' How then can the power of a police officer, acting on his own view of the facts, be compared with the judicial determination of a magistrate who has fully and fairly heard all the parties? Moreover, we must remember that the power to bind over is not an ordinary one, but has been described as [17] 'a wide judicial discretionary power, to be exercised with great caution and not

[13] (1882) 10 L. R. Ir. 285.
[14] *Ibid.* at p. 291.
[15] 34 Edw. 3, c. 1. For the history of justices of the peace, see Holdsworth, History of English Law, Vol. 1, pp. 286-98.
[16] At p. 36.
[17] By Fitzgerald J. in *R.* v. *Queen's County Justices* (1882) 10 L. R. Ir. p. 303; 15 Cox C. C. p. 155.

capriciously, and as it is capable of being abused, to be jealously watched over by this Court'. The fact that such a dangerous judicial power has been given to the magistrates is not a convincing ground for the argument that in principle a similar preventive power must be given to the police.

If the binding-over cases are not directly in point this leaves us with only the two Irish cases, *O'Kelly* v. *Harvey*[18] and *Humphries* v. *Connor*[19] as possible authorities for the present case. Before discussing these cases separately it is important to note that neither one is concerned with the right of the police to enter private premises. In view of the particular protection which English law has always given to the house it does not follow necessarily that because the police are given a certain power to prevent disorder in the public streets, they therefore have the same power in relation to private premises. On this point Lawrence J. says that[20] 'if a constable in the execution of his duty to preserve the peace is entitled to commit an assault, it appears to me that he is equally entitled to commit a trespass'. But if we put the problem in another way the answer is less obvious: because an officer may in a public street remove a provocative emblem from a person's coat, it does not necessarily follow that he is entitled to enter that person's home in the belief that a breach of the peace may occur there. It may be reasonable for the law to give the officer both a right to commit an assault and a right to commit a trespass, but we cannot assume that, having been given one exceptional right, he must therefore have been given the other.

But apart from the distinction between assault and trespass, it is suggested that the two Irish cases can be distinguished on other grounds. In *O'Kelly* v. *Harvey*[21] supporters of the Land League called a meeting which the Orangemen threatened to attack. It was held that the magistrate was justified in dispersing the meeting[22] 'if he had reasonable grounds for his belief that by no other possible means could he perform his duty of preserving the public peace'. As Dicey has pointed out, this power of dispersing the meeting only arises when[23] 'it is impossible to preserve or restore the peace by any other means'. It is an exceptional power to be used only under exceptional circumstances of absolute necessity. Can it be exercised at every

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18 (1882) 10 L. R. Ir. 285; (1883) 14 L. R. Ir. 105.
19 17 Ir. C. L. R. 1.
20 At p. 257.
21 *Supra*, n. 18.
22 Law, C. at p. 112.
23 Law of the Constitution, 9th ed. pp. 273, 274.

meeting where breaches of the peace will probably occur? During an election breaches of the peace will probably occur at various political meetings: can the police therefore disperse these meetings? The answer must be that they cannot do so unless it is found that they cannot restore order by any other means. If they can disperse a meeting merely on the ground that some disorder is probable, then the right of public meeting becomes an illusory one. But in the present case the justices only found that the police had reasonable grounds for believing that breaches of the peace would occur if the police were not present: there was no finding that the circumstances were so exceptional that the police could not have restored order in the usual way. How vague these findings were is shown by the fact that nothing is said as to who was likely to cause these breaches of the peace or where they would take place; whether by the supporters of the meeting or by their opponents, in the hall or outside. It is important to note here that there was no finding that the meeting was an unlawful assembly because it filled peaceable citizens with reasonable fear.[24] Under such circumstances it would have been not only the right but the duty of the police to disperse the meeting. The claim of the police in the present case was the entirely different one that they were entitled to attend the meeting because they had reasonable grounds to believe that it would become unlawful in the future if they were not there.

Humphries v. *Connor*[25] is the only other case cited. A Protestant lady wearing an orange lily walked through a crowd of Roman Catholics. A disturbance began, and a constable who had no other means of restoring the peace removed the lily. Dicey's comment is as follows[26]: 'The case is very noticeable; it carries the right of magistrates or constables to interfere with the legal conduct of A, for the sake of preventing or terminating a breach of the peace by X, to its very furthest extent. The interference, if justifiable at all, can be justified only by necessity, and an eminent Irish judge has doubted whether it was not in this case carried too far.' The present case carries the right considerably further, for there was no disturbance and there was no finding of absolute necessity. Of course it must be assumed that

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[24] *R.* v. *Vincent*, 9 C. & P. 109. Cf. Palles C.B. in *O'Kelly* v. *Harvey* (1882) 10 L. R. Ir. 285, 291: 'The question then is, has a justice of the peace authority in law to disperse a meeting not shown to have been unlawful, because he reasonably believes the meeting is held with an unlawful intent? I have not myself been able to find any authority in support of the affirmative of this proposition; none such has been cited at the bar, and I do not believe that any such exists.'

[25] 17 Ir. C. L. R. 1.

[26] At p. 276, n. 2.

neither Miss Humphries in the orange lily case nor the appellant in the present one intended to provoke a breach of the peace: if they had had such an intention they would have been wrong-doers and the police could have arrested them.

Turning from the cases, what authority can be found in the books? Both the Lord Chief Justice and Avory J. cite Blackstone's Commentaries,[27] but his only statement is that 'the general duty of all constables, both high and petty, as well as of the other officers, is to keep the king's peace in their several districts; and to that purpose they are armed with very large powers, of arresting, and imprisoning, of breaking open houses, and the like: of the extent of which powers, considering what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance'.[28] This general statement does not tell us what these 'large powers' are. When we turn to Stone's Justices' Manual[29] and to the chapter on Criminal Law and Procedure[30] in Halsbury's Laws of England, we find that both agree that a constable may break open the outer door of a house if a felony or a breach of the peace is being committed in the house: they also agree that[31] 'this may also be done if a felony will probably be committed unless a private person or constable interferes to prevent it'. If the law is that a constable may enter private premises when he has reasonable grounds for believing that any offence, whether a felony or a misdemeanour, is likely to be committed, then why have the books heretofore limited the statement to felonies?

In referring to the statement in Stone's Justices' Manual that a constable may break into a house to suppress an affray, Avory J. says that,[32] 'If he can do that, I cannot doubt that he has a right to break in to prevent an affray which he has

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[27] Vol. 1, p. 356.

[28] In Book IV, ch. 18, Blackstone deals with 'The Means of Preventing Offences'. No reference is made to the powers of the police in this connexion.

[29] 1935, p. 208: 'A constable may break open doors to take a *felon* if he be in the house, and entry be denied after demand, and notice given that he is a constable; or where a felony has been committed, and there be reasonable ground to suspect a particular person to be the offender, or where a felony has not been committed but is likely or about to be so, in the house, in order to prevent its occurrence, or where a constable hears an affray in a house he may break in to suppress it, and may, in pursuit of an affrayer, break in to arrest him' (Chitty's Constables, 2nd ed. p. 59; 2 Hale 95; 1 Hawk. c. 63, 2 Hawk. c. 14).

[30] Lord Hailsham's ed. § 124: 'A private person or a constable may break open the outer door of the house of another in order to prevent a murder being committed in such house and to arrest the offender. . . . This may also be done if a felony will probably be committed unless a private person or constable interferes to prevent it.' Mr. Justice Avory was part author of this chapter.

[31] *Ibid.*

[32] At p. 255.

reasonable cause to suspect may take place on private premises'. It is here that the fundamental importance of the problem lies. At first sight it may seem unreasonable to say that a police officer cannot take steps to prevent an act which, when committed, becomes a punishable offence. But it is on this distinction between prevention and punishment that freedom of speech, freedom of public meeting, and freedom of the press are founded. Here again Dicey has stated the problem in succinct form[33]: 'All that is here insisted upon is, that such checks and preventive measures are inconsistent with the pervading principle of English law, that men are to be interfered with or punished, not because they may or will break the law, but only when they have committed some definite assignable legal offence.' To hold that the police are entitled to attend a meeting held on private premises because they believe that seditious speeches will be made or breaches of the peace will occur if they are not present does seem to be in conflict with this pervading principle. If any derogation from it is required by modern circumstances, then it ought to be stated in clear and certain terms. It is not suggested that the police, who are noted for their fairness, will in the future act in an oppressive manner, but it is desirable that this exceptional power should not be left vague and undefined. Perhaps the most satisfactory solution would be to provide by statute that all private halls or other places in which public meetings are to be held must be licensed, the licence to contain a provision for the admission of the police to any assembly at which, in their opinion, breaches of the peace may occur.[34] This would make it clear that the police had no general right to enter upon private property merely because they had reasonable grounds for believing that an offence was likely to be committed there.

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[33] Law of the Constitution, pp. 244, 245.

[34] See a note in 49 Harvard L. R. (1936), 156, 157 in which the American law on this point is discussed.

THE MENTAL ELEMENT IN CRIMES AT COMMON LAW.

J. W. C. Turner.

ACTUS non facit reum nisi mens sit rea is one of the best-known maxims of our Common Law. It is regarded at the present day as a statement in general terms which indicates the essentials of liability to criminal punishment. The maxim sharply contrasts the *conduct* of the wrongdoer, *i.e.* his physical acts or omissions, with the *state of his mind* at the time, *i.e.* what he was thinking when he so acted.

In the discussion which follows the words '*actus reus*' will be used to denote *such result of human conduct as the law seeks to prevent,* that is to say, a specific crime.[1] The expression '*actus reus*' is in itself clumsy, but it has long been justified by its usefulness. This human conduct may either be active, or may consist of an omission, in the case where there is a legal duty to act.[2] It may be well at this point to remind students that there are cases in which it is not forbidden by law for a man to act so as to produce unpleasant or fatal results to others, *i.e.* where the result of his conduct is not regarded as an *actus reus.* Examples occur in the execution of public justice,[3] in self defence,[4] in defence of property,[5] in proper surgical treatment,[6] in lawful sports and pastimes,[7] and so on.

The association of the words *actus* and *mens rea* seems first to have occurred in connexion with perjury, but the origin and early history of the whole phrase are obscure, and there is need for research in this field. The present article is concerned with the state of the law to-day, and only a brief outline of the history of the matter will be presented. It must

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[1] In the offence of 'Attempt to commit crime' the *actus* may or may not be in itself forbidden by law. See C. L. J. Vol. V, No. 2, p. 235.

[2] *R.* v. *Senior* [1899] 1 Q. B. 283; *R.* v. *Smith* (1826) 2 C. & P. 449; *R.* v. *Edwards* (1838) 8 C. & P. 611; *R.* v. *Barrett* (1846), 2 Car. & K. 343.

[3] 1 Hale P. C. 497.

[4] 1 Hale P. C. 486.

[5] *R.* v. *Hussey* (1924) 18 Cr. App. R. 160; *Hinchcliffe's Case* (1823) 1 Lew. 161.

[6] Stephen, Dig. C. L. p. 207, art. 288.

[7] In which the law allows the participants to consent to receive, or run the risks of, a certain amount of physical harm. *R.* v. *Donovan* [1934] 2 K. B. 498; *R.* v. *Coney* (1882) 15 Cox 46; *R.* v. *Bradshaw*, 14 Cox 83.

not be supposed, however, that the Latin maxim has always meant what it is taken to indicate nowadays. Its meaning has passed through a long historical development and this may account for some of the doubts and confusions surrounding the words *mens rea* which have been engendered by legal literature and the reports of decided cases.

Failure to recognize basic distinctions and lack of precision in language have created many difficulties; but these can be disposed of more easily than has sometimes been supposed. It is the aim of the present article to establish that criminal liability at Common Law depends upon a few very simple rules.

The remarks which follow in so far as they are of a general character, are intended to apply to all completed [8] crimes at common law except Public Nuisance, an anomalous offence with peculiar rules due to special reasons.[9] It is not my present purpose to discuss or analyse either the crimes created by statutes, or the many crimes which have been taken over from the Common Law and incorporated into statutes (for example, larceny or perjury); these I shall only mention incidentally and by way of illustration. Experience of teaching criminal law has suggested that in the first instance it is better not to combine closely a discussion of the mental element required in offences at common law with that of the mental element required in offences under statute.[10]

It is submitted that the rules on which liability depends in crimes at common law when the accused is a normal person [11] are as follows:—

Rule I.—It must be proved that the conduct of the accused person caused the *actus reus*.[12]

Rule II.—It must be proved that this conduct was *voluntary*.

Rule III.—It must be proved that the accused person *realized at the time* that his conduct might *produce results of a certain kind*, in other words that he must have foreseen that certain consequences were likely to follow on his acts or omissions. The extent to which this foresight of the consequences must have extended is fixed by law

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[8] See note (1), *ante*.

[9] See Kenny, Outlines of Criminal Law (ed. 1933), p. 46.

[10] The latter topic is dealt with by Mr. R. M. Jackson elsewhere in this issue, and I beg leave to state that I am in complete agreement with his views.

[11] For the case of 'abnormal' persons, *e.g.* infants, lunatics, see p. 48, below.

[12] Fitz. Abr. Corone, pl. 163, 303; or contributed to it in a substantial degree. This may sometimes be difficult to prove, *e.g. R.* v. *Macdaniel* (1754) 1 Leach 44; *R.* v. *Holland* (1841) 2 Moody & Rob. 351; *R.* v. *Sawyer* (1887) 106 Sess. Pap. 301.

and differs in the case of each specific crime. The lawyer must know, therefore, what these consequences must be in each crime.

Of Rule I no more need be said for present purposes, as it deals with cause and effect in relation to events, and has nothing to do with the mind of the wrongdoer. But Rules II and III require evidence as to the state of his mind. Now it is obvious that it is impossible really to know for certain what was passing in the mind of the accused person; it can only be surmised by a process of inference from what is known of his conduct.[13]

Of course in early times the difficulty felt in ascertaining the mind of man [14] and the rule that a prisoner could not himself give evidence tended to produce the practice of imputing *mens rea* from certain given sets of circumstances.[15] In more modern days the difficulty has not been regarded as insuperable; a recent illustration of this is given by the case of Woolmington,[16] which seems clearly to have cut down the well-established rule that a man is presumed to intend the natural consequences of his acts —a rule which rested on the ancient basis. In the case of *Angus* v. *Clifford*,[17] Bowen L.J. said: 'A great deal of the argument . . . arises . . . under cover of the fallacious use . . . of the principle that you cannot look into a man's mind. . . . It is said that you are to have fixed rules to tell you that he must have meant something, one way or the other, when certain exterior phenomena arise. The answer is that there is no such thing as an absolute criterion which gives you a certain index to a man's mind. . . . So far from saying that you cannot look into a man's mind, you must look into it, if you are going to find fraud against him; and unless you think you see what must have been in his mind, you cannot find him guilty of fraud.' These *dicta* make it plain that the jury, before they may find the accused person guilty, have a difficult task to perform; for they must, on the evidence, come to a decision as to what must have been in the mind of the man himself. It is, indeed, a decision based on circumstantial evidence, but it is a very great mistake to suppose that there is anything 'constructive' about it, and that all we need say is that if the ordinary reasonable man would not have acted like the accused person the requirement of *mens rea* is satisfied. This point is strongly put by Professor

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13 See C. L. J. Vol. V, No. 1 at p. 65.
14 Y.B. 17 Edw. IV, f. 2 (Pasch. pl. 2).
15 See *Colvile* v. *Parker* (1608) Cro. Jac. 158.
16 (1935) 25 Cr. App. R. 72.
17 [1891] 2 Ch. 449 at p. 471.

Holdsworth as follows: 'We must adopt an external standard in adjudicating upon the weight of evidence adduced to prove or disprove *mens rea*. That, of course, does not mean that the law bases criminal liability upon non-compliance with an external standard. So to argue is to confuse the evidence for a proposition with the proposition proved by that evidence.' [18]

It is essential then to determine what the state of the accused person's mind must have been, and *for two distinct purposes*. The distinction between these two purposes has often been overlooked, but it is most important. They are—

(a) In order to ascertain if his conduct was voluntary or involuntary. (Rule II above.)

(b) In order to ascertain if he realized what the consequences of his conduct might be. (Rule III above.)

Now the expression *mens rea* has been used to indicate liability under both (a) and (b), but the difference between the two not having been clearly indicated, confusion of thought has been encouraged and complexity of exposition has resulted [19]: nor can it be said that the ancient lawyers were more successful in this matter than we have been. In modern times attention has been concentrated on (b), the man's realization of the consequences of his conduct; in early law the emphasis was laid on (a), the question whether his conduct was voluntary or involuntary. It was this latter inquiry (b) which marked the beginnings of the recognition of a mental element at all as a necessary ingredient of liability.

Rule II.—Voluntary Conduct.

Legal historians tell us [20] that in the earliest period of our law the mental state of the wrongdoer was little, if at all, regarded, and that no mental element was required to establish his liability. This may perhaps have been largely due to an early notion that the function of law in matters between subjects was not so much to punish as to regulate the compensation that should be paid, whether to the private individual or to the Crown. As time went on the idea gradually developed, probably under ecclesiastical influence, that the infliction of punishment was necessary.[21] The same influence seems to have led to an

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[18] Holdsworth, H. E. L. III, 374.

[19] *E.g.* Kenny, *op. cit.* pp. 41 *et seq.*; Stroud, *Mens Rea*, pp. 29—50; and almost any passage in which *R.* v. *Prince* (1875) L. R. 2 C. C. R. 154 is discussed by any author.

[20] P. & M. II, 470 *et seq.*; Holdsworth, H. E. L. II, 50 *et seq.*; but cf. Winfield in L. Q. R. Vol. XLII, 37.

[21] 'When crude retaliation appears in a medieval code, the influence of the Bible may always be suspected': P. & M. II, 489, n. 2.

agreement that liability to punishment should depend upon moral guilt.[22] This moral guilt was measured by strictly objective standards. The question was not whether the wrongdoer thought his conduct right or wrong, but whether the tribunal thought it right or wrong according to the standards which it recognized. None the less those standards necessarily involved recognition of a mental element in the matter and so the state of a wrongdoer's mind, actual or presumed, came to be relevant. Here we can trace a debt to Roman law with its conceptions of *dolus* and *culpa lata*. It was clear that there could be no moral guilt in a man who kills in the execution of lawful sentence of death, but after the Norman Conquest it was a long time before one who killed by misadventure (*per infortunium*) or in self-defence (*se defendendo*) could be held not guilty, although by the thirteenth century the Royal pardon could be expected in such cases.[23]

In modern times criminal liability is no longer based upon a moral standard[24] when the wrongdoer is deemed to be sane, but echoes of the past are to be found in the language of the authorities[25] and tend to obscure the law. In the case of persons who set up the defence of insanity a moral criterion is still observed, but the principles to be applied have been stated in vague and uncertain terms. They will be considered below.[26]

The abolition of 'presentment of Englishry'[27] in 1340, and the operation of the rules concerning the privilege known as 'benefit of clergy' assisted in the recognition of the mental element as a factor in the assessment of criminal liability for homicides, which eventually came to be divided into justifiable homicide, excusable homicide, manslaughter, murder. It is in connexion with homicide that the Latin maxim about *mens rea* seems to have been almost exclusively used.

It was soon recognized that moral guilt could not be attributed to a man whose acts were involuntary; such a person had no *mens rea*. The scope of valid defence, on a charge of murder, is widened from the plea 'I did not kill him' to 'I could not help killing him'. A greater step is taken when the accused is

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22 Holdsworth, H. E. L. II, 259.
23 P. & M. II, 479; Holdsworth, H. E. L. III, 313.
24 Stroud, *Mens Rea*, p. 9.
25 Kenny, *op. cit.* 123, 'wicked negligence'; *R.* v. *Prince* (1875) L. R. 2 C. C. R. 154, judgment of Bramwell B. at pp. 175-7; *R.* v. *Spencer* (1867) 10 Cox 525 at p. 527, 'an evil mind'; *R.* v. *Bateman* (1925) 94 L. J. K. B. 791, at p. 794, 'conduct deserving of punishment'; *R.* v. *Doherty* (1887) 16 Cox 306 at p. 309, 'ought to be punished'; Stephen, H. C. L. Vol. III, p. 16, 'a most wicked action'.
26 Page 48.
27 P. & M. II, 488; Holdsworth, H. E. L. III, 314.

allowed to plead 'What I did was harmless in itself and I did not foresee that it would cause his death'. The final extension is reached when he may say 'Although what I did was in itself harmful, yet I did not foresee that it would cause his death'.[28]

The tendency to look rather at the act than at its consequences is illustrated by the argument in *Hales* v. *Petit*[29] in 1563. Hales had drowned himself and the question was whether this involved forfeiture. Plaintiff's counsel with narrow ingenuity had argued that the death had to occur before the felony was complete and that therefore Hales was not a felon when he died. In answer counsel for the defendant said: 'The act consists of three parts. The first is the imagination. . . . The second is the resolution. . . . The third is the perfection which is the execution of what the mind has resolved to do. And this perfection consists of two parts, *viz.* the beginning and the end. The beginning is the doing of the act which causes the death, and the end is the death, which is only a sequel to the act. And of all the parts the doing of the act is the greatest in the judgment of our law, and it is in effect the whole, and the only part that the law looks upon to be material . . . the doing of the act is the only part which the law regards; for until the act is done it cannot be an offence to the world, and when the act is done it is punishable. Here the act done by Sir James Hales, which is evil and the cause of his death, is the throwing himself into the water, and the death is but a sequel thereof, and this evil act ought in some way to be punished.'

The doctrine that 'Mistake' may in certain cases be a valid defence has also been built up on the basis of the early idea of moral guilt. It is hard to impute moral guilt to a man who has been mistaken as to facts which would have made his conduct harmless if things had been as he supposed. But in order to obtain immunity for him it was necessary to treat his mistake as rendering his conduct not really voluntary. Thus Sir Matthew Hale, writing in the seventeenth century, said[30]: 'But in some cases *ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary.'

Of course for a long time past mistake of fact has been admitted to prove that the accused did not realize the possible consequences of his conduct.[31]

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[28] It is not certain that this last defence is valid in every case even at the present day, though it is submitted that it ought to be admitted: see pp. 53 *et seq.* below.

[29] 1 Plow. 253 at p. 259.

[30] 1 Hale, P. C. 42.

[31] Fost. 265.

A modern instance in which the words *mens rea* are used to indicate the mental element involved in the *conduct* of the accused person, in contrast to the mental element involved in his realization of the consequences, is to be found in the report of *R.* v. *Wheat and Stocks* (1921) 15 Cr. App. R. 134, *per* Shearman J. at p. 135. The importance of the distinction must be emphasized, because if it is understood and kept prominently before the mind it will be found to remove some of the unnecessary difficulties which have been allowed to accumulate round the topic of *mens rea* at common law, and a great number of those which exist, or have been imagined, concerning the mental element in statutory offences,[32] for there are many cases of the latter in which the mental element is only relevant to establish whether the acts of the accused person were voluntary or not.

If it be established that the accused person's conduct was involuntary he will have the valid defence that he is not responsible for the *actus*; for example, if B holds a weapon and A, against B's will, seizes his hand, and the weapon, and therewith stabs C[33]; and possibly an act done under hypnotic suggestion or when sleep-walking[34] or by pure accident.[35] In certain cases of insanity,[36] infancy and drunkenness the same defence may be successfully raised. Of course, even if the conduct is voluntary there may well be the defence that it did not *cause* the particular result under consideration,[37] (a defence which does not rest upon the absence of any necessary mental element), or again that the conduct was that of omission to act in circumstances where there was no duty to act.[38]

Rule III.—Foresight of the consequences.

(i) The first point to note is that homicide, assault, and false imprisonment are the only crimes at common law in which the rule as to foresight of the consequences presents any difficulty. All the others either by their nature or definition indicate the

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32 For what, it is submitted, is the true view of the latter, see Mr. R. M. Jackson's article in this issue.

33 1 Hale 433.

34 Kenny, *op. cit.* 58.

35 1 Hawk. c. 29, ss. 2 and 3; 1 Hale 472.

36 *R.* v. *Hay* (1911) 22 Cox 268; *R.* v. *Fryer* (1915) 24 Cox 403.

37 *E.g.* if two of three mountaineers, having fallen, are dangling over a precipice and are dragging the third over also, then if he cuts himself clear, he does not cause their death, for they are doomed and he cannot save them—he merely saves his own life by preventing them from pulling him over. See also *R.* v. *Pocock* (1851) 17 Q. B. 34; *R.* v. *Dalloway* (1847) 2 Cox 273.

38 *R.* v. *Smith* (1869) 11 Cox 210.

mental element required[39] either with regard to the consequences, or to the purpose, of the accused person's conduct. This requirement is not the same in all cases, and it is this variation which led Sir James Stephen[40] to object to our Latin maxim and to say[41]: 'It seems confusing to call so many dissimilar states of mind by one name'.

But the answer to this criticism is—

(a) that *all* crimes at common law have the first requirement that the offender's conduct must have been *voluntary*, and therefore to this extent the maxim states an essential condition of liability (*i.e.* Rule II);

(b) that the maxim is a general statement which *covers* all the particular variations as to the exact consequences which must have been foreseen; it means that in *every case there must have been foresight* in the mind of the offender of *some* effect produced by his conduct (*i.e.* Rule III) and so to this extent also the maxim indicates an essential condition of liability. It is true that in some crimes emphasis is laid upon a specific *intention* on the part of the offender. But that which a man *intends* to bring about he obviously foresees, so that the maxim (and Rule III) applies.

(ii) Rule III is so expressed as to dispense with the use of terms which necessitate a complicated and often unsuccessful attempt to explain to the jury what is meant. The jury can be told that it is sufficient if they are satisfied, on the evidence, that the accused person must have realized that his conduct might produce such and such result. In other words the rule covers such expressions as 'malice aforethought', and all the combinations of the word 'negligence' with vague adjectives such as 'wicked',[42] 'gross',[43] 'culpable',[44] 'complete',[45] 'clear',[46] 'criminal',[47] and so on. It includes the two states of mind called 'Intention'[48] (*dolus*) and 'Recklessness'[49] or 'Rashness'[49] (*culpa lata*). It must, however, be observed that

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[39] Holdsworth, H. E. L. II, 452.
[40] H. C. L. II, 95.
[41] *R.* v. *Tolson* (1889) 23 Q. B. D. 168, at p. 185.
[42] Kenny, *op. cit.* 122; Stroud, *op. cit.* 127; *R.* v. *Handley* (1874), 13 Cox. 79, at p. 81.
[43] *R.* v. *Markuss* (1864) 4 F. & F. 356, at p. 359.
[44] *R.* v. *Doherty* (1887) 16 Cox 306, at p. 309.
[45] *R.* v. *Noakes* (1866) 4 F. & F. 920, at p. 921.
[46] *R.* v. *Macleod* (1874) 12 Cox 534, at p. 539.
[47] *R.* v. *Elliott* (1889) 16 Cox 710, at p. 714.
[48] Austin, Jurisprudence (4th ed.), Vol. 1, pp. 431–442.
[49] Austin, *loc. cit.*, and see *Hudston* v. *Viney* [1921] 1 Ch. 98, at p. 104, 'an attitude of mental indifference to obvious risks'. See also Stephen, H. C. L. III, pp. 55, 56.

the rule does *not* cover the state of mind of a man who is *inadvertent,* or *negligent* in the proper legal significance of that word.

I have elsewhere discussed the distinction between the three quite different states of mind indicated by the words (a) Intention, (b) Recklessness, and (c) Negligence.[50]

'Intention' describes the state of mind of the man who not only foresaw, but also desired the possible consequences of his conduct. 'Recklessness' describes the state of his mind if he foresaw those consequences, although there is no evidence that he desired them; he may have been indifferent to their ensuing, or he may even have hoped that they would not ensue, but he knowingly took the risk of their ensuing. 'Negligence' indicates the state of mind of the man who acts *without adverting* to the possible consequences of his conduct; he *does not foresee* those consequences. The word further indicates that he is in some measure in fault, and that we should expect an ordinary, reasonable, man to foresee the possibility of the consequences and to have regulated his conduct so as to avoid them.

It is, however, submitted with emphasis that although this negligence may be blameworthy and may ground civil liability, *it is at the present day not sufficient to amount to* mens rea *in crimes at common law.*[51] This, indeed, is true also of those old common law crimes which have been incorporated into statutes.

There can hardly be any question of the truth of this submission so far as crimes other than homicide, assault, and false imprisonment are concerned.[52] No one could reasonably contend that a man, *in a fit of inadvertence,* could make himself guilty of the following crimes, to take a few examples,[53]—'arson', 'burglary', 'larceny',[54] 'rape', 'robbery', 'perjury', 'breaking prison', 'conspiracy'; or of 'incitement' or 'attempt'. The word 'negligence' has been so much misused that it is a pity it cannot be entirely excluded from the language of criminal law. Sometimes it is employed when 'neglect (*i.e.* omission) to act' is meant,[55] and the question of advertence to the conse-

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[50] See C. L. J. (1933), V, No. 1, pp. 62—65.

[51] Excluding, as has been pointed out, the case of public nuisance, in which offence a mental element is irrelevant to the question of liability, although it may affect the amount of punishment.

[52] See Holdsworth, H. E. L. II, 452.

[53] Such of these as are now incorporated in statutes were originally crimes at common law.

[54] Although *animus furandi* was not always required in the earliest period. Holdsworth, H. E. L. II, 359.

[55] *R.* v. *Smith* (1826) 2 C. & P. 449, at p. 457; in *R.* v. *Jones* (1870) 11 Cox 544 'neglect' is used in place of 'negligence'.

quences of the omission is treated as obvious[56]; but the usual practice is to attach an abusive adjective such as 'gross', 'culpable' or 'wicked' in order to alter the meaning of the noun, and then to indulge in a confusing effort to explain to the jury the difference, by suggesting that there are different *degrees* of negligence.

In some cases the attempt to elucidate the principles to be applied is abandoned and the question of what is to be done with the person in the dock is handed over to the jury, who are left, without any proper guidance, to come to a decision under any chance influences or prejudices that may happen to be operating at the moment in their minds—even such as may be aroused by the personal appearance of the prisoner, his calling, demeanour, or social position. With commendable caution they generally bring in a verdict of not guilty. 'The case is . . . a remarkable illustration of that which it has too often been said cannot be defined, . . . *viz.* culpable or criminal negligence. It is impossible to define and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible except by means of illustrations drawn from actual judicial opinions.' So runs the editors' footnote to *R.* v. *Noakes*.[57] 'No rule exists in such cases. It is a matter of degree determined by the view the jury happen to take in each particular case.'[58] Even questions of law are sometimes left to the jury. For example they are asked to decide whether the negligence amounted to 'a culpable wrong'[59] or whether it 'went beyond a mere matter of compensation between subjects' and amounted to 'a crime against the state'[60]; they are told 'as to what act of negligence is culpable, you, gentlemen, have a discretion'[61]; and so on.

These difficulties are avoided if the word 'negligence' is used only in the one meaning, its proper meaning, *viz.* 'inadvertence'. There can be no different degrees of inadvertence as indicating a state of mind. The man's mind is a blank as to the consequences in question; his realization of their possibility is nothing and there are no different degrees of nothing. There is a legal presumption that a man does foresee (and indeed 'intend') the natural consequences of his acts, and therefore so soon as that presumption has been raised by the

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[56] *R.* v. *Haines* (1847) 2 C. & K. 368, at p. 371.
[57] (1866) 4 F. & F. 920, at p. 921.
[58] Stephen, H. C. L. Vol. III, p. 11.
[59] *R.* v. *Spencer* (1867) 10 Cox 525.
[60] *R.* v. *Bateman* (1925) 94 L. J. K. B. 791.
[61] *R.* v. *Doherty* (1887) 16 Cox 306.

evidence, the burden of establishing inadvertence is upon the defence. It may well be that the circumstances, as disclosed by the evidence, are such that the accused cannot convince the jury that he did not foresee the consequences of his conduct, although that is the truth. But to say that such a man is liable *because he was 'negligent'* is to confuse evidence with law.

As stated above this question of foresight only presents difficulties in the cases of homicide, assault, and false imprisonment. In early law, during the period of what may perhaps be called 'absolute liability', the distinctions between 'intention', 'recklessness' and 'negligence' were irrelevant; it was immaterial whether a man did or did not foresee the possibility of the harm which his conduct was likely to cause.[62] He may have been negligent, but that was not the reason why he was punished. 'We never hear of "negligence" or of any similar standard of liability.'[63]

When the moral standard was introduced it was felt that liability should depend on something evil or wicked in the offender's conduct, and it can scarcely be argued that mere negligence shows such moral delinquency. It must, however, be remembered that the introduction of a moral standard was not a sudden change imposed by statute—it represents the effect of new moral ideas on the minds of judges who by their training were not likely to be responsive to ethical innovations.[64]

It was at an early stage recognized that the conduct of the accused must be voluntary; but it was long before it was fully admitted at common law that he must also have foreseen the consequences of his conduct.

The early severity was honeycombed but not swept away. Fragments of it remain to this day.[65] In the older authorities we find this conflict between ancient rule and new thought illustrated by decisions and opinions which alternate from one side to the other, and there are constant attempts to excuse the decision whichever way it went.

In 1664 a man accidentally shot his wife after taking all reasonable precautions to ascertain that the pistol was unloaded, and he was found guilty of manslaughter. Even Kelynge, who reported the case,[66] seems to have been uneasy about it, and Foster about a hundred years later writes[67] of this judgment as

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62 P. & M. II, 471, 474.
63 P. & M. II, 484.
64 See, *e.g.* the judge's insistence on the strict rule in benefit of clergy mentioned in Kelynge 51.
65 See pp. 53 *et seq.* below.
66 Kelynge 41.
67 C. C. & C. L. pp. 264-5.

not 'strictly legal' and mentions a similar case heard by himself, in which he directed the jury to acquit the prisoner.

Again Hale [68] tells us of an application of the old rule of severity in the case of a servant who was held to be guilty of manslaughter for shooting his master in a cornfield in mistake for a deer, a justification for the decision being sought in the argument that 'for the omission of due diligence and better inspection before he adventured to shoot it might amount to manslaughter and so be capital' which, says Hale, 'seems to be the truer opinion', although he goes on to refer to a case in 1471 of a servant shooting his master in mistake for a trespasser, in which the more lenient view prevailed, justification for it being sought in a statute [69] which made it lawful to shoot trespassers.

Many illustrations could be given of the clash between the two different standards. Until the latter half of the nineteenth century the legislature seems to have been influenced by the more progressive doctrine, for it will be found that the foresight of consequences is in one form or another required in most of the statutory crimes created during this period.[70] The judges, however, moved more slowly. The old rule was clear and simple to apply—the new standard suffered from the vagueness of a notion which had not yet been reduced to a working formula. It was not, and indeed up to the present day has not been, propounded and accepted as a simple statement that what is required to establish liability is merely foresight of consequences. The authorities have constantly used moral language which describes, but does not define, *mens rea*. It will be sufficient to take three illustrations from Foster. 'I believe . . . the cases . . . will . . . be found to turn upon this single point, that the fact hath been attended with such circumstances as carry in them the plain indications of an heart regardless of social duty and fatally bent on mischief.' [71] 'It is not the part of judges to be perpetually hunting after forfeitures *where the heart is free from guilt.*' [72] 'A wicked, depraved, malignant, spirit.' [73] The indifference which used to be felt to madness as an excuse for crime [74] illustrates the old view. The much-criticized doctrine of Coke that if death be caused by any act that is unlawful it is murder,[75] shows the old view giving

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[68] 1 P. C. 40.
[69] St. *Malefactores in parcis*, 21 Edw. 1.
[70] See Mr. Jackson's article, below.
[71] C. C. & C. L. p. 257.
[72] *Ibid.* p. 264.
[73] *Ibid.* p. 256.
[74] Stephen, H. C. L. III, 110.
[75] 3rd Inst. p. 56: 'if he had shot . . . at any tame fowl of another man's, and the arrow by mischance had killed a man, this had been murder for the act was unlawful.'

way to the new merely to the extent of admitting that the act done must be 'unlawful'. By the time of Foster the new view has produced the further modification that the act must have been 'felonious', 'if his intention was to steal the poultry . . . it will be murder by reason of the felonious intent'[76]; but Foster was sufficiently conservative to continue, 'but if it was done wantonly and without that intention, it will be barely manslaughter'. It is necessary to appreciate that to say that the act must be *unlawful* or must be a *felony* is not to give a *reason* for the liability of the accused, but is to give an *excuse* for clinging to a remnant of the old rule of absolute liability. It is an excuse based on the rough moral notion that a man who intentionally commits a felony must have a wicked heart, and therefore 'ought to be punished' for the harm which he has done accidentally. It is to guard against this kind of reasoning that our modern rules of evidence exclude in most cases any communication to the jury of a prisoner's previous misdeeds.

When we reach the nineteenth century we shall see that the new doctrine has gained the supremacy although the old is not entirely eliminated. Thus Stephen speaks of Coke's doctrine as 'astonishing'[77] and even of Foster's modification of it as 'cruel and, indeed, monstrous',[78] and argues that neither Coke nor Foster was adequately supported by authority. Yet Stephen himself did not disentangle the two different points of view, and fell into much confusion, looking first in one direction and then in the other. In the case of murder he instinctively recoiled from the doctrine of absolute liability[79] without clearly grasping that the principle which was opposed to it applies also to manslaughter. So he was led into confusion and self contradiction. He was anxious to improve the law relating to Murder,[80] but was apparently not very much interested in Manslaughter. In his Digest the latter crime is treated in a confusing manner[81] and no clear principle is enunciated. Stephen thought that a death caused accidentally by a person who was engaged in any unlawful act would be manslaughter even though he did not foresee at all that any physical harm might be caused to anyone. His definition of 'unlawful' in

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[76] Foster p. 258.

[77] H. C. L. III, 57.

[78] H. C. L. III, 75. Stephen might have reflected, however, that manslaughter was a 'clergyable' felony, punishable, until 1822, merely with burning in the hand and imprisonment for not more than one year.

[79] See, *e.g.* his direction to the jury, *R.* v. *Serné* (1887) 16 Cox 311, at pp. 312, 313, and in *R.* v. *Doherty* (1887) 16 Cox 306, at pp. 307—310; also H. C. L. III, pp. 57, 75, 83, 84.

[80] See, *e.g.* H. C. L. II, pp. 91-2; III, p. 57, n. 3, pp. 83, 84.

[81] Arts. 314, 315, and Note VII (7th ed. pp. 225, 461).

this connexion is far too wide. He says it 'includes, I believe, all crimes, all torts, and all acts contrary to public policy or morality, or injurious to the public'.[82] This doctrine takes us back to the time of Hale and cannot be maintained[83] nowadays, although it still appears in text-books.[84] Stephen indeed in some passages goes even further; thus when alluding to the case of a man throwing a lighted match into a haystack he says,[85] 'but if he did not intend to throw the lighted match on to the haystack I do not think he would be guilty of any offence at all unless death was caused, in which case he would be guilty of manslaughter'. He seems to have held that railway servants came under some specially severe rule of law, although he does not specify that rule or give any authority for his view.[86] Decided cases are definitely against this opinion.[87] Stephen in fact confused 'negligence' in the sense of inadvertence with 'neglect' to perform a duty.[88] Nor did he achieve a clear explanation of what he meant by 'culpable' negligence.[89] The Criminal Code (Indictable Offences) Bill, 1879, was largely Stephen's work.[90] Clause 174 provides a clear and reasonable definition of the mental element in murder, but manslaughter is not so well handled. Clause 177 reads: 'Culpable homicide not amounting to murder is manslaughter.' Clause 167 gives a definition of culpable homicide which is clumsy, partly circular, and wider than the decided cases support. It reads: 'Homicide is culpable when it consists in the killing of any person either by an unlawful act or by a culpable omission to perform or observe any legal duty, or by both combined, or by causing a person by threats or fear of violence to do an act which causes that person's death, or by wilfully frightening a child or sick person.'

It is, however, unnecessary to discuss at length the statements in the literature of the nineteenth century, for the decided cases of the period established conclusively that *inadvertence* does not ground liability at common law. A few quotations will suffice: 'There must be such a degree of culpability as to

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82 H. C. L. III, p. 16.

83 See the reasons for this statement in C. L. J. Vol. V, No. 1, at pp. 69, 70.

84 *E.g.* Archbold, 28th ed. 894; Kenny, *op. cit.* p. 120; Stephen, Dig. C. L. 7th ed. p. 210.

85 H. C. L. II, p. 113.

86 See H. C. L. II, pp. 113 note, 123; *R.* v. *Tolson* (1889) 23 Q. B. D. 168, at p. 185 'forgetting to notice a signal'.

87 *R.* v. *Elliott* (1884) 16 Cox 710; *R.* v. *Trainer* (1864) 4 F. & F. 105.

88 H. C. L. pp. 122-3; Gen. View of C. L. pp. 76, 126.

89 See Gen. View of C. L. p. 128; and H. C. L. III, p. 11: 'There must be more, but no one can say how much more, carelessness than is required in order to create civil liability.'

90 Stephen, H. C. L. III, 16, note 1.

amount to gross negligence on his part . . . if you think it inadvertence not amounting to culpability then the prisoner is not liable.' [91] 'If the jury thought that . . . the circumstances showed such a gross and culpable negligence as would amount to a culpable wrong and show an evil mind they ought to convict the prisoner, if not, they ought to acquit.' [92] 'But I will tell you that what the prisoner must be found guilty of is gross negligence, or recklessly negligent conduct. . . . For intellectual defect, for mere mistake of judgment, he cannot be found guilty. That is the subject of the civil remedy.' [93] 'But the legal meaning of gross negligence is greater negligence than the absence of ordinary care. It is such a degree of negligence as excludes the loosest degree of care, and is said to amount to *dolus*.' [94] In spite of much clumsiness of language these and other [95] directions to juries make the matter quite plain. The case of *R.* v. *Jones* [96] in 1874 is sometimes cited as authority for the proposition that mere negligence (inadvertence) is sufficient to ground liability, but on examination it will be found that this is not justified. In that case the prisoner caused the death of a boy by shooting. Lush J.[97] said: 'What he did was either an accident or was negligence on his part. . . . If a person points a gun without examining whether it is loaded or not and it happens to be loaded and death results he is guilty of negligence and manslaughter. . . . If he held the gun pointed at the boy and so held it until the child came out of the pantry, and it went off, what can that be but so improperly and carelessly handling the gun as to be negligence, and therefore manslaughter?' Of this it must be remarked that the case was tried at Shrewsbury Assizes on July 30, which was the day immediately following that on which was tried before the same judge the case of *R.* v. *Finney*.[98] In *Finney's Case* Lush J. sharply distinguished 'inadvertence not amounting to culpability, or what is properly termed an accident' (which he said would not make a prisoner liable) from 'gross negligence' and 'gross carelessness' (which would render a prisoner liable). Finney, an attendant at a lunatic asylum, had caused the death of a patient in a bath by turning on the hot water instead of the

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91 *R.* v. *Finney* (1874) 12 Cox 625, *per* Lush J. at p. 626.
92 *R.* v. *Spencer* (1867) 10 Cox 525, *per* Willes J. at p. 527.
93 *R.* v. *Elliott* (1889) 16 Cox 710, *per* O'Brien J. at p. 714.
94 *Cashill* v. *Wright* (1856) 6 E. & B. 899, *per* Erle J. at p. 899.
95 *E.g. R.* v. *Markuss* (1864) 4 F. & F. 356; *R.* v. *Noakes* (1866) 4 F. & F. 920; *R.* v. *Doherty* (1887) 16 Cox 306; *R.* v. *Jones* (1870) 11 Cox 544; *R.* v. *Chainey* (1913) 23 Cox 620, at p. 623. See also Stephen, H. C. L. III, p. 76.
96 12 Cox 628.
97 At p. 629.
98 *Supra.*

cold. There is no essential difference on the facts between killing by projecting scalding water at a person and killing by projecting shot at a person, and therefore it is submitted that in the case of Jones, the learned judge on July 30 meant by the word 'negligence' what he meant by the words 'gross negligence' the day before.

The law is summed up in Archbold as follows[99]: 'It would seem that to create criminal responsibility the degree of negligence must be so gross as to amount to recklessness. Mere inadvertence, while it might create civil liability, would not suffice to create criminal liability.'

There must, then, be foresight of consequences if liability is to be incurred; but as stated above, what kind of consequences must have been foreseen will be different for each kind of crime. Each crime must therefore be considered separately. Before, however, dealing with specific crimes it will be convenient to deal with some other general questions. First it is necessary to consider the difficulties which have been caused, particularly to students, by the *dicta* of the judges in the case of *R.* v. *Prince*.[1] The case, and the commentaries upon it in the text-books, are too well known to need detailed recapitulation. Prince, reasonably believing her to be over the age of sixteen years, had taken a girl who was in fact under that age, out of the possession and against the will of her father. He was found guilty, and his conviction was affirmed by the Court for Crown Cases Reserved, solely on the interpretation of 24 & 25 Vict. c. 100, s. 55, as will be seen in the majority judgment of the Court delivered by Blackburn J.[2] All the judges seem to have agreed in refusing to read into the section any such words as 'with knowledge that she is under sixteen'. Three other judges, however, delivered judgments, and two of them discussed at length the subject of *mens rea*. They were of opinion, as it seems, that some *mens rea* on the part of the accused was essential, but differed as to what would amount to this. Bramwell B.[3] appears to have thought that it was necessary, but sufficient, to establish that the accused intended to do what was *morally* wrong. Brett J., however, held[4] that it was essential to establish that the accused had 'knowingly' done 'acts which would constitute a crime if the result were as he anticipated, but in which the result may not improbably end by bringing the

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[99] *Op. cit.* p. 897; see also Halsbury, Vol. IX, p. 445, note (*t*).
[1] (1875) L. R. 2 C. C. R. 154.
[2] At pp. 170—173.
[3] At pp. 173—177.
[4] At p. 171.

offence within a more serious class of crime'. Denman J. expressed agreement with Bramwell B., but added a definition of the word 'unlawfully' which occurred in the section in question. He spoke, however, of the prisoner having 'wrongfully and knowingly violated the father's rights'.[5] It seems therefore that although all three judges agreed that words as to knowledge of the girl's age could not be read into the section, Bramwell B. wished to read into it the words 'with knowledge that his conduct was contrary to morality', Brett J. the words 'with knowledge that his conduct amounted to a crime', and Denman J. the words 'with knowledge that his conduct was a violation of the father's rights'. There was, of course, no justification for reading any of these expressions into the section. Their *dicta* on these points were entirely *obiter* and it is a great pity that so much prominence has been given to them in text-books,[6] as though they were authoritative expositions of general principles to be applied in all criminal cases. In reading the three judgments it is necessary to avoid confusing the two different points set out in our Rules II and III. It was certainly necessary to prove that Prince voluntarily incited the girl to come away (Rule II). But his foresight of the *consequences* of his incitement was merely that she would come with him, and was not affected by his knowledge of her age, or of criminal law, or of morality. Every man runs the risk that a Court may decide that what he has done is a crime, or is immoral, but his liability does not depend on his own ability to make that decision; and his risk is just the same whether or not he has any idea that what he is doing is immoral, or a civil wrong, or a crime. Brett J. therefore was unfortunate in his statement that the 'true meaning' of *mens rea* is to be found in his *dictum* 'that it exists where the prisoner knowingly does acts which would constitute a crime if the result were as he anticipated, but in which the result may not improbably end by bringing the offence within a more serious class of crime', for this may mislead the reader into confusing (a) the accused's foresight of the actual events which may occur as a consequence of his conduct, with (b) his knowledge of criminal law; or even perhaps into the worse mistake of confusing the former with (c) the purely objective fact that the law does treat his conduct as a crime of a certain kind. 'Knowledge' is not 'intention' and therefore even if the word 'knowingly' or the like could be read into section 55, this change would not affect the *mens rea* of the

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[5] At p. 179.
[6] *E.g.* Kenny, *op. cit.* pp. 41—43; Stroud, *op. cit.* pp. 15, 34—39.

accused person, but it would merely add another necessary fact to the *actus reus*, namely, the offender's knowledge of the girl's age. It follows that it is misleading to say that 'an intention to do anything that is wrong legally, even as a mere civil tort and not as a crime at all, would be a sufficient *mens rea*'.[7]

It is none the less necessary to consider how far an offender's liability may be affected if the effects produced by his conduct are different from what he anticipated they would be. Can his liability be reduced thereby, or, alternatively, can it be increased? The answer is fairly simple: the difference in the effects will not *reduce* the liability of the offender so long as—

(i) it does not alter the *actus reus*, and

(ii) the effects actually produced are *of the same kind* as those anticipated.

Thus, if A, intending to kill B, shoots at B but misses him and kills C, then A is guilty of murder. A, however, will not be guilty of murder if he is a soldier in battle who shoots to kill his officer B, but misses him and kills C who is one of the enemy, for the *actus reus* of murder has not been committed,[8] although the death of a human being was what A had expected. Again if A shoots at B intending to kill him, but misses him and kills an animal which he did not know was there, he will not be guilty of murder because not only is the *actus reus* altered, as in the last case, but also the effects of his conduct are of a different kind from those which he expected. On the other hand the difference in the effects produced from those anticipated will *increase* the offender's liability in the case of Manslaughter, and, subject to the doubts expressed below,[9] in two cases of Murder.

Abnormal mental conditions.

(i) *Insanity.*[10] It was stated above that in modern times criminal liability is no longer based upon a moral standard when the wrongdoer is deemed to be sane. The case of a wrongdoer who is insane has presented problems which cannot be said yet to have been solved. Space does not permit of a detailed examination of this troublesome topic. The older authorities reveal a law of great severity.[11] In the well-known answers given by the judges in *M'Naghten's Case*[12] there can be detected

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[7] Kenny, *op. cit.* 41.
[8] A is of course guilty of 'attempt to murder'.
[9] P. 53.
[10] *Ante*, p. 35.
[11] Hale, P. C. I, pp. 30—32.
[12] (1843) 10 Cl. & F. 200.

a strong attraction towards a moral criterion, but their language has been interpreted in the other direction. The test now seems to be that the accused person will be punishable (a) if he is able to know what he is doing [Rule II above] and (b) if he is able to foresee the consequences of his conduct [Rule III above] and (c) if he is able to know that to cause those consequences is wrong 'according to the standard adopted by reasonable men'.[13] He is considered to know that it is wrong in this sense if he knows that it is 'punishable by law'. In the case of insanity, then, it appears not only that we still retain a moral standard for liability but also that this moral standard is objective in the sense that it is not the actual moral standard of the accused person, but the moral standard of the tribunal by whom he is tried.

(ii) *Infancy.* It is submitted that the leniency of the law towards persons of tender years rests on the same basis, and is subject to the same rules as apply in cases of Insanity.[14] The child is regarded, up to the age of eight years, as a person whose intellectual development is so incomplete that it cannot pass the tests for liability. But after that age the prosecution is given the chance of proving that its intellectual development is sufficient, in the case before the Court, to pass those tests.

(iii) *Provocation.* It will be seen below[15] that a case of intentional killing under serious provocation is treated as 'voluntary manslaughter' (although it is really murder in extenuating circumstances). The homicide is 'owing to a sudden transport of passion, which, through the benignity of the law, is imputed to human infirmity'.[16] The idea that killing under provocation was in some measure excusable, developed from the recognition of the view that killing in self defence was excusable. The old cases and authorities[17] show the close connexion between the two ideas. The importance of a moral standard in defining an *actus reus* is here noticeable. It is not considered 'wrong' to kill in self defence (*i.e.* there is no *actus reus*), and a homicide under provocation 'is considered as flowing' not 'from brutal rage or diabolical malignity', but 'from human frailty' to which 'the law indulgeth',[18] and is therefore to be treated as

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[13] *R.* v. *Codere* (1916) 12 Cr. App. R. 21, at p. 27, *per* Reading L.C.J.; in the case of *R.* v. *Hicklin* (1868) L. R. 3 Q. B. 360, although the defence of insanity was not raised, the point is the same: the Court decided, on their own moral standard, that the moral standard of the defendant was irrelevant.

[14] See Hale, P. C. 26—29.

[15] P. 41.

[16] Foster, C. C. & C. L. 255.

[17] See Foster, *op. cit.* pp. 290—302.

[18] Foster, *op. cit.* p. 291.

less serious than murder. In measuring this human frailty an objective standard is even to this day applied. Here, it must be noted, we have to consider the mental state of the wrongdoer, not in relation to *mens rea* (for the blow he struck was voluntary, and he intended to kill by means of it), but in relation to the criminality of the *actus* itself. It is therefore not surprising that our Courts have adhered to an objective standard by which to decide if the provocation was, or was not, sufficiently serious to amount to an excuse. The question is not whether the wrongdoer himself regarded the provocation as excessive, but whether an average man in the same circumstances would, in the opinion of the judge, have so regarded it. Therefore a man who is by nature defective in intellect or self control is not allowed the benefit of his inherent infirmity for the present purpose.[19] Of course there is the further subjective question, whether the wrongdoer was in fact provoked, and this is a question for the jury to decide.

We can now turn to the consideration of the mental element in two crimes of the greatest importance.

A. *Manslaughter.* I have endeavoured to show elsewhere [20] that in manslaughter it must be established that the prisoner *foresaw that his conduct might cause physical harm to someone.* Elaborate and involved language such as encumbers the reports and the text-books is unnecessary. Prosecuting counsel would be well advised to try to induce the judge to avoid all reference to 'negligence' and to direct the jury that they should convict the prisoner if they are satisfied on the evidence that—

(a) his conduct caused the death of the deceased person; and
(b) that his conduct was voluntary; and
(c) that at the time he either intended to inflict on someone a physical harm or that he foresaw the possibility of inflicting a physical harm and took the risk of it.

Counsel for the prisoner, however, can hardly be expected to forgo the advantages which confusion of thought and language confer upon the defence in raising reasonable doubt in the minds of the jury.

It is impossible to leave the subject of manslaughter without commenting on the very curious position created by recent legislation. In a book [21] on criminal law lately published in the United States it is said that 'hardly ever has penal legislation been based upon a thorough analysis of the problems

[19] *R.* v. *Alexander* (1913) 23 Cox 604; *R.* v. *Lesbini*, 24 Cox 516; but see *R.* v. *Hopper* (1915) 11 Cr. App. R. 136.
[20] C. L. J. Vol. V, No. 1, pp. 68 *et seq.*
[21] Hall, Theft, Law and Society, p. 67.

involved'. The following paragraphs should bring home to us our kinship with our American cousins. The Road Traffic Act, 1930, s. 11, in effect provides that it shall be an offence punishable with a fine or imprisonment or both to drive 'a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public'. Section 12 of the same Act in effect provides that it shall be an offence, not punishable with imprisonment, to drive 'a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road'. In a previous number of this Journal [22] it was submitted that section 11 must be construed as meaning that the driver realizes that he is driving in such a way that he may cause physical harm to someone, whereas section 12 must be construed to mean either that the driver is inadvertent (*i.e.* 'negligent' in the strict sense of the word) and does not realize any possibility of physical harm, or that the driver is causing annoyance or inconvenience to other users of the road without exposing them to any risk of physical harm. It was then argued that if a motorist drives so as to bring himself within section 11 and in consequence of such driving causes any person's death, he must be guilty of manslaughter, and that it followed that should he be charged in one count of the indictment for manslaughter and in a second count for dangerous driving contrary to section 11, then if the jury find him not guilty of manslaughter they could not properly be allowed to convict of dangerous driving under the second count of the indictment. And further it was submitted with respect but with emphasis that the decision of the Court of Criminal Appeal in the case of Stringer [23] was misconceived. That those submissions were correct is borne out by a very curious enactment which appeared in 1934. By the Road Traffic Act, 1934, s. 34, upon the trial of a person who is indicted for manslaughter in connexion with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under section 11 of the principal Act (which relates to reckless or dangerous driving) to find him guilty of that offence, whether or not the requirements of section 21 of the principal Act (which relates to notice of prosecutions) have been satisfied as respects that offence.[24] The omnipotence of statute is well

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[22] C. L. J. Vol. V, No. 1, pp. 71 *et seq.*

[23] [1933] 1 K. B. 704.

[24] The C. C. A. in the case of Stringer held that the proper procedure was to prefer two indictments, one for manslaughter and the other for dangerous driving. The Court gave no reason for this, but in any case it does not affect the point under discussion : see C. L. J. Vol. I, p. 74 (iii).

illustrated by this piece of legislation, which has violated the rules of logic and made unreason into law. The only way in which it can be made comprehensible to rational minds is by assuming that it was the intention of the legislature to invest the jury, in cases where motorists have caused death, with the prerogative of mercy. They are now in effect allowed to say: 'We find that the prisoner has committed manslaughter, but we shall convict him of dangerous driving instead.'[25] This is, however, rather hard on other slayers of man, for whose cases juries are given no such discretion: it may be regarded then as an interesting revival of the spirit which centuries ago gave rise to the privilege known as Benefit of Clergy, adapted to suit modern prejudices, and in the refined form previously reserved for peers and clerks in holy orders, because there is now no branding of the thumb and even the licence is not endorsed with any indication that manslaughter has been committed. It must be remembered, however, that the privilege extends to all motorists, of whatever social class, and thus the great principle, that the law knows no distinction of persons, is maintained.

Of course it may well be argued that, on the very basis of what has been said above, no man ought to suffer for a death which he did not foresee, and that our law of manslaughter should be altered. This is true, but the alteration should be made on a broad general principle and should not take the form of a privilege extended only to people who drive motor vehicles. In addition, such a change in our law would have unsatisfactory results unless the law of murder is also modified, first, by the abolition of the present obscurities and absurdities of 'malice aforethought'[26] and by the substitution for it of a clear and simple definition of the mental element required; and second, by allowing, at the discretion of the Court, variations in the punishment to which the convicted murderer can be sentenced. We need an extension of that discretion which has been allowed for hundreds of years to judge and jury in the case of an intentional killing under serious provocation. This crime is now called 'Voluntary manslaughter',[27] but it really is murder with extenuating circumstances. With all their faults the rules

[25] The maximum term of imprisonment for 'dangerous driving' is now two years: R. T. Act, 1934, s. 4.

[26] 'It would, however, be on all accounts far better to substitute, as the Draft Code does, a definite enumeration of the states of mind intended to be taken as constituent elements of murder for a phrase which is never used except to mislead or to be explained away': Stephen, H. C. L. III, 83.

[27] Kenny, *op. cit.* pp. 116 *et seq.* used the expressions 'Voluntary' and 'Involuntary' manslaughter in a meaning different from that in which they are employed by other writers. His view, peculiar to himself, is not borne out by the cases he cited, and cannot be supported. See C. L. J. Vol. V, No. 1, pp. 67—68.

of benefit of clergy did provide a relaxation of the extreme rigour of the common law as to capital offences,[28] and the same spirit which led to the establishment of this ancient privilege should be applied to the improvement of our law of homicide at the present day.

A change in the law of murder was strongly advocated by Stephen many years ago. 'I am convinced that in regard to capital cases the judge should have a discretion analogous to that which he has in cases not capital. The grounds on which sentence of death in cases of murder are remitted are so well known, that in my opinion there would be no insuperable difficulty in specifying them by statute, and enabling a judge if he was of opinion that any one of them existed in a given case to pass, instead of sentence of death, sentence for a long term of penal servitude.'[29]

B. *Murder.* The necessary mental element in this crime has been the subject of discussion and explanation in the literature of criminal law for ages, under the name of 'malice prepense' or 'malice aforethought'. Modern writers have subjected this phrase to an analysis which is often very elaborate. On examination, however, it will be found that the 'different forms of *mens rea* which have been held to be sufficiently wicked to constitute murderous malice' are, *with the exception of two cases*, all contained within the simple statement that *the jury must be satisfied that the prisoner foresaw that his conduct might cause the death of some person.*

The two exceptions are said to be—

(i) Where the prisoner caused the death in resisting arrest or imprisonment by an officer of justice, although he did not foresee that his resistance would be likely to endanger anyone's life, *e.g.* if he merely tripped up the officer.[30]

There is no modern English case in which this severe rule has been applied. The late Professor Kenny pointed this out and doubted whether the Court of Criminal Appeal would support such a view.[31] In the Irish case of *The State* v. *M'Mullen*,[32] Kennedy C.J.[33] gave unqualified approval to the statement of the law in Hale, and in Foster, as being 'carried down through the years without losing its validity', and as 'a

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[28] See Foster, C. C. & C. L. pp. 305-6.
[29] H. C. L. II, p. 89.
[30] Stephen, Dig. Cr. Law, Art. 315, Ill. 11.
[31] Kenny, *op. cit.* p. 141.
[32] [1925] 2 Ch. I. R. 9.
[33] At p. 22.

correct statement of the present state of the law on this subject as it is also of the ancient'. Of these *dicta* it may be respectfully said that, in so far as they may have been intended to indicate the opinion of the learned Chief Justice that it is immaterial that the prisoner did not realize that he was endangering life, (i) they are *obiter*; for M'Mullen had already shot an official in the bank which he had attempted to rob, and when pursued had fired back and killed a member of the Civic Guard: it was clear then that he had done an act which he must have foreseen was dangerous to life; (ii) to adopt at the present day, without modification, the law of homicide as stated by Hale is to take up a position which as long ago as 1877 Stephen regarded as indefensible.[34] Further, Hale was not concerned to distinguish between a killing which was unforeseen and one which was foreseen. What he was mainly concerned with was the question of *provocation*,[35] for which purpose it was important to decide if the officer was known to be such, and also if the arrest was legal; (iii) the same may be said of reliance upon Foster.[36] Foster's purpose in discussing this class of case is the same as was that of Hale. The only grounds for supposing that Foster was considering a case of accidental killing are in his use of the word 'scuffle' on page 272. It should be noted that on the same page Foster places on the same footing as killing an officer of justice the killing of a private person who intervenes, after notice 'of his friendly intentions', between two persons who are taking part in a sudden affray 'where no felony is committed or wound given', and it could hardly be contended that at the present day one of the combatants would be found guilty of murder if as the result of a push he caused the death of the peacemaker.

It is submitted that the correct view of the law of this matter at the present day is as it was stated by Professor Kenny and as it was intended to be by the Draft Code Commissioners.[37] It is difficult to believe that an unprejudiced jury would consent to convict a man of murder who, in resisting arrest, without using any dangerous violence accidentally caused the death of an officer of justice.

The other exception is one which presents more difficulty.

(ii) Where the prisoner caused the death 'by an act of violence done in the course or in the furtherance of

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[34] See *e.g.* his Digest of Cr. Law, Note VII; H. C. L. III, pp. 60-68.
[35] See Stephen, H. C. L. III, 64.
[36] See *Woolmington's Case* (1935) 25 Cr. App. R. 72, at pp. 87—96.
[37] See Criminal Code (Indictable Offences) Bill, 1879, clause 175.

> . . . a felony involving violence',[38] although he did not foresee that his act of violence would be likely to endanger anyone's life.

We have seen already that Coke thought that a death caused as the result of any unlawful act was murder,[39] and that this 'astonishing doctrine' was limited by Foster to cases where the unlawful act was a felony. Even this view was described by Stephen as 'cruel and indeed monstrous' and only to be extenuated by the fact that for fifty-four years after Foster's death all felonies except petty larceny were in theory capital crimes, so that the doctrine would not appear so remarkable to him as to the people of 1880. What Stephen does not seem to have fully appreciated was that the severe proposition of which he complained was really the ancient rule, and therefore did not need any particular authority to be quoted in support of it. His criticism of Coke and Foster[40] that they quoted no, or insufficient, authority is therefore misconceived. The weakness of Foster's argument was not that he could not quote authority for the severity still left in his doctrine, but that he could not quote better authority for his alleviation of the old rule.

What is important is the fact that progress is set in the direction of recognizing the necessity of foresight of consequences. In 1773[41] a prisoner was found guilty, by a jury, of murder of a child by repeated rape. As it was an 'entire new case' the legality of the indictment was submitted to all the judges, who gave no opinion as to the general question Whether an indictment for murder could be maintained for this offence? but they unanimously agreed That in the present case the indictment was bad because it . . . omitted to aver 'thereby giving the said F. P. one mortal wound', although it did state grievous injuries from which the victim languished and died.

In 1857[42] a prisoner was charged with murder and rape of a child under ten years of age. Wightman J. told the jury that there was no pretence in this case that there was any malice other than what might be implied in law. He explained that if they were satisfied that the girl died from the effect of the rape then that act being a felony in point of law, would of itself be such malice as would justify them in finding him guilty of murder. The jury returned into Court saying they were satis-

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38 *Director of Public Prosecutions* v. *Beard* [1920] A. C. 479, *per* Lord Birkenhead L.C. at p. 493.
39 *Ante*, p. 42; Stephen, H. C. L. III, 75.
40 H. C. L. III, pp. 57, 75.
41 *R.* v. *Lad*, 1 Leach 96.
42 *R.* v. *Greenwood* (1857) 7 Cox 404.

fied as to the fact of rape and that the death resulted therefrom, but were not agreed as to finding the prisoner guilty of murder. Wightman J. told them that under these circumstances it was open to them to find the prisoner guilty of manslaughter and that they might ignore the doctrine of constructive malice if they thought fit.

In *R.* v. *Franz*[43] death was caused in the course of a burglary by someone who had tied a woman hand and foot and forced something into her mouth which had suffocated her. Blackburn J. said,[44] 'if . . . when the deceased met her death from violence by any . . . persons to enable them to commit a burglary (or any other felony) although those who inflicted that degree of violence might not have intended to kill her . . . all who are parties to that violence are guilty of murder'. There is nothing to show that the learned judge by the word 'violence' meant that the prisoner foresaw a risk of death, and his *dictum* must probably be taken to indicate his support of the more severe doctrine. In *R.* v. *Horsey*[45] the prisoner was charged with murder by wilfully setting fire to a stack of straw, and so burning to death a man, of whose presence he was quite unaware, who was heard to shriek in the flames and was probably a tramp sleeping in the stack. Prisoner had already been found guilty of the felony of arson. Bramwell B.[46] told the jury that the law laid down was that where a prisoner, in the course of committing a felony, caused the death of a human being, that was murder even though he did not intend it. And though (he said) that may appear unreasonable, yet as it is laid down as law it is our duty to act upon it. The learned Baron, obviously disliking the rule, ingeniously contrived a loophole for the jury by suggesting that they might not be satisfied that the deceased was in the barn or inclosure when the prisoner fired the stack, but 'came in afterwards' and thus his death 'could not be the natural consequence of the prisoner's act'. The verdict was 'not guilty'. In footnotes the editors of the report strongly urge that the rule as stated is bad, and say that 'all the authorities except one mere opinion of a text-writer limit it to cases where the act done was of a homicidal character; or one of which the natural probable result would be the death of a human being,' and that 'there cannot be the legal crime of murder where there is not the moral guilt of the crime.' In *R.* v. *Luck*[47] the same editors[48] speak of 'the reaction against the

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[43] (1861) 2 F. & F. 580.
[44] At p. 582.
[45] (1862) 3 F. & F. 287.
[46] At p. 288.
[47] (1862) 3 F. & F. 483.
[48] Note (*b*) at p. 491.

old doctrine of constructive homicide and of the return to the more rational and humane rule or test of complicity which characterizes the modern cases, *viz.* a participation not merely in a *common design* but a common design to *commit a felony* and a *felony homicidal in its nature and likely to lead to homicide'*. In *R.* v. *Skeet*[49] Pollock C.B.[50] said 'the doctrine of constructive homicide . . . only applies in cases where all the parties were aware that deadly weapons are taken with a view to inflict death or commit felonious violence, if resistance is offered'.

The same judge in the case of *R.* v. *Vamplew*[51] said[52] 'the crimes of murder and manslaughter were in some instances very difficult of distinction. The distinction which seemed most reasonable consisted in the consciousness that the act done was one which would be likely to cause death. No one, however, could commit murder without that consciousness.' On this the editors of the report[53] say: 'It is conceived that this is a valuable deduction of a general principle which is often applicable and supports the comments made on the case of *R.* v. *Horsey* . . . with reference to the doctrine of constructive murder in cases where there has been no act likely to cause death, or of which death would be the probable result.'

This opinion of Foster and Finlason is quoted as showing the views of experienced lawyers in the middle of the nineteenth century. Stephen also objected to the doctrine of constructive malice. Of it he says[54]: 'It has been repeated so often that I amongst others have not only accepted it, though with regret, but have acted upon it. The case in which I did so was not one which set its possible cruelty in a specially strong light. At Lincoln, . . . two men and a woman were tried for murder before me. They had conspired together to rob a man. The girl brought him to the appointed place, the men threw him down and robbed him. He had a weak heart and he died. The three prisoners were convicted of murder and sentenced to death, but were not executed.' And again,[55] 'the present law is generally supposed to make it murder . . . to kill a man unintentionally by violence used in order to rob him, which violence was neither likely nor intended to kill. Under the Draft Code such offences would be manslaughter.'[56] Again, 'The law can hardly be justified in "presupposing" that a thief "carrieth

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49 (1866) 4 F. & F. 931.
50 At p. 936.
51 (1862) 3 F. & F. 520.
52 At p. 522.
53 At p. 522, note (*c*).
54 H. C. L. III, 57 and n. 3.
55 H. C. L. III, 83, 84.
56 Criminal Code (Indictable Offences) Bill, 1879, clauses 174, 175.

that malicious mind that he will achieve his purpose though it be with the death of him against whom it is directed" from the fact that he trips a man up in order to rob him and happens to kill him.'[57]

A few years later Stephen expressed his views in a direction to a jury. In the case of *R.* v. *Serné*[58] he said 'if you think that either or both of these men . . . killed this boy either by an act done with intent to commit a felony . . . or by conduct which to their knowledge was likely to cause death and was therefore eminently dangerous in itself—in either of these cases the prisoners are guilty of wilful murder. . . . I will say a word or two upon one part of this definition because it is capable of being applied very harshly in certain cases, and also because though I take the law as I find it I very much doubt whether the definition which I have given, although it is the common definition, is not somewhat too wide. . . . In my opinion the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed. . . . I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony which caused death, should be murder. As an illustration of this, suppose that a man intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, that would be murder. I think that everyone would say in a case like that, that when a person began doing wicked acts for his own base purposes he risked his own life as well as that of others. That kind of crime does not differ in any serious degree from one committed by using a deadly weapon such as a bludgeon, a pistol, or a knife. . . . In the present case . . . it is alleged that he arranged matters in such a way that any person of the most common intelligence must have known perfectly well that he was putting those people in deadly risk.'

It is clear then that Stephen was not merely of opinion that mere intent to commit a felony ought not to be regarded as malice aforethought, but that he doubted if that was really the law. Of it he says[59]: 'As to this I have great doubts, unless the felony is in itself an act of such a kind as to fall within (a) or (b)' [(a) and (b) being 'Intent to kill or do grievous bodily

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[57] H. C. L. III, p. 51.
[58] (1887) 16 Cox 311, at pp. 312, 313.
[59] General View of C. L. p. 141, note 1.

harm' and 'Knowledge that the act done will probably kill or do grievous bodily harm although the offender hopes that the consequence will not follow'].

It will be observed that up to this point the doctrine under criticism referred only to 'felony' as stated by Foster, and that there is, so far, no reference to 'felony of violence'.[60] Such was the position when in 1898 a prisoner was indicted[61] for murder on the ground that he was engaged in the commission of a felony (an illegal operation to procure abortion[62]) which resulted in the death of a woman. Bigham J. said[63]: 'I tell you, as a matter of law, that if you are of opinion that the girl died as a result of the prisoner's unlawful operation, he is guilty of murder. You and I have no business to alter the law. . . . I do not mean to say that there are not some cases where this rule of law is not applicable. There may be cases where the death is so remote a contingency that no reasonable man could have taken it into his consideration. . . . If you can think . . . that . . . the prisoner . . . could not have contemplated that it could have resulted in death, then he is not guilty of the graver charge, but is guilty of the lesser crime of manslaughter.' In answer to a written question from the jury the judge said: 'I can only repeat to you what I have already said. If you should be of opinion that the prisoner could not, as a reasonable man, expect death to result, you can find a verdict of manslaughter. If the prisoner, as a reasonable man, could see no possibility of death, then you can find a verdict of manslaughter.'

Five years later in a similar case[64] Lawrence J. adopted the direction of Bigham J. in *R.* v. *Whitmarsh*, that if the jury should be of opinion that the prisoner could not, as a reasonable man, have expected death to result they might find a verdict of manslaughter. In 1911, in another abortion case,[65] Avory J. said: 'When he did the act, did he contemplate, or must he as a reasonable man have contemplated, that death was likely to result, or must he as a reasonable man have contemplated that grievous bodily harm was likely to result? If, in your opinion, he must as a reasonable man have contemplated either of those consequences then your duty is to find him guilty

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[60] Except in the case of *R.* v. *Skeet*; but here the reference to 'deadly weapons' makes it plain that the judge was basing liability on foresight of the chance of killing.

[61] *R.* v. *Whitmarsh*, 62 J. P. 711.

[62] 24 & 25 Vict. c. 100, s. 58.

[63] At p. 712.

[64] *R.* v. *Bottomley and Earnshaw* (1903) L. J. Vol. 38, p. 311.

[65] *R.* v. *Lumley*, 22 Cox 635.

of murder. If you are of the opinion . . . that he did the act . . . but that he had not at the time in contemplation, and would not as a reasonable man have contemplated, that either death or grievous bodily harm would result . . . then you would be justified in convicting him of manslaughter.'

In none of the above three cases was the word 'violence' mentioned and there is nothing whatever to suggest that the jury's decision should be affected one way or another by the kind of felony which had been committed. The test they had to apply was clearly stated and it was whether the prisoner could or could not see the possibility of the further consequences of his actions. It is also clear that Bigham J. did not regard himself as introducing any legal innovation by his direction to the jury.

In 1902 the late Professor Kenny expressed[66] his doubt of the old doctrine in the following words: 'The modern tendency is thus towards a limitation of the rule to such felonies as are likely to cause death . . . and homicide resulting from any felony which was intrinsically unlikely to cause death would not be murder at all, but only a case of "involuntary" manslaughter.' In later editions Kenny, speaking of death resulting from felonious abortions, said that the judges 'developed a rule that in such cases the jury may convict of a mere manslaughter', and that the rule as to malice aforethought 'must be limited to such felonious acts as involve violence to an unwilling victim'. But the reports of the cases which Kenny was considering contain no mention of violence, and there was no direct authority for such a rule as he stated. The directions of the judges in the three cases in question make it quite plain that the test was foresight of consequences, although it will be observed that such expressions as 'did he contemplate, or must he as a reasonable man have contemplated', unless uttered *per incuriam*, would seem to indicate that the learned judge thought that the test may be purely objective, so that the actual state of the prisoner's mind is immaterial provided that 'a reasonable man' would have contemplated the consequences. If this is so, it is respectfully submitted that the learned judge was wrong.[67] It may well be, however, that the judge was seeking to put in simple language to the jury the point that they could, on the evidence, take it as a fact that the prisoner did realize what, in their opinion, a reasonable man would certainly have realized.

Such was the state of the authorities when the case of Beard,

[66] Outlines of Criminal Law, 1st ed. p. 137.
[67] See *ante*, p. 33.

who had been found guilty of murder, came before the Court of Criminal Appeal in 1919.[68] The prisoner, who had been drinking, had raped a girl of thirteen after a violent struggle in the course of which he placed his hand over her mouth and also throttled her, and so caused her death. The prisoner was found guilty of murder. He appealed, and the Court of Criminal Appeal quashed the conviction and substituted a conviction of manslaughter. Thereupon the Crown appealed[69] to the House of Lords. The Home Secretary thought it well to inform their Lordships that he had advised His Majesty that the capital sentence ought not in any event to be carried out.[70] The House of Lords reversed the order of the Court of Criminal Appeal.

In this case there was a good deal of evidence to show that a violent struggle had taken place and that the prisoner had exercised considerable pressure upon the child's throat.[71] In other words there was evidence to establish that the prisoner must have realized that he was exposing the child's life to danger. He had, however, been drinking heavily and at the original trial the defence raised only the point that he was so drunk that he could not form the intent necessary in law to establish the crime of murder, and relied upon the case of *Meade*.[72] But when the case came before the C. C. A. a new point was taken, and it was submitted that the judge had misdirected[73] the jury (i) by not leaving it to them, as a matter of fact, to decide whether, as a reasonable man, the prisoner ought to have contemplated that death would result, and (ii) by not putting to them properly the law relating to drunkenness as an excuse for crime, so as to reduce the crime from murder to manslaughter, as laid down in the case of *Meade*.[72] It was submitted[74] for Beard that although his counsel had not argued point (i) before the jury at the trial yet the judge should have dealt with it in his summing up. But the C. C. A. held[75] that the evidence did not support the submission that there was an absence of intention to inflict serious injury upon the child, but was wholly inconsistent with it, and that the learned judge was right in directing the jury that upon the facts and circumstances of the case (apart from the defence resting upon

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68 14 Cr. App. R. 110.
69 Under Criminal Appeal Act, 1907, s. 1 (6).
70 14 Cr. App. R. at p. 184.
71 14 Cr. App. R. at pp. 114 and 116.
72 [1909] 1 K. B. 895.
73 14 Cr. App. R. at pp. 110, 112.
74 On the authority of *R.* v. *Hopper* (1915) 11 Cr. App. R. 136.
75 14 Cr. App. R. at p. 115.

drunkenness) they should return a verdict of murder. The C. C. A. seem to have thought that upon the facts of the case the prisoner did contemplate the risk of death, but unfortunately they used language of a general character, which taken from its context can be read as stating the law to be that a death caused by an act of violence, done in the course of a felony of violence, is murder even though the prisoner, as a reasonable man, did not foresee the danger to life. 'There was a struggle of a horrible description. . . . No questions were put . . . for the defence to minimize the effect of the testimony about the struggle. . . . The child was straining every nerve and muscle to escape him, and in order to overpower her and stop her struggles and screams he eventually did the act which resulted in her death. By the law of England that is murder: it is an act of violence done in the course of or furtherance of a felony involving violence, and beyond all question and beyond the range of any controversy that is murder.' [76] As to this it may respectfully be suggested that unless the Court was dealing merely with the facts of the case before it, the statement of the law, on the authorities up to that moment, was not beyond the range of controversy. It was unfortunate that the defence did not take the point at all in the trial, and that, when it was raised in the Court of Appeal and in the House of Lords, it was put with so little vigour that the House of Lords could dismiss it in the following few lines. 'The first objective failed, the Court being of opinion (apart from the defence of drunkenness) that the evidence established that the prisoner killed the child by an act of violence done in the course or in furtherance of the crime of rape, a felony involving violence. The Court held that by the law of England such an act was murder. *No attempt has been made in your Lordships' House to displace this view of the law, and there can be no doubt as to its soundness.*' [77]

This was, however, the real point upon which the defence should have been rested. Beard's defence could only be found in an absence of sufficient *mens rea*. It was obvious that it was hopeless to suggest that he was so drunk that his acts were not voluntary (Rule II above). The only chance of success therefore lay in rebutting the presumption that he intended the natural consequences of his acts. This might have been done (a) by showing that the force used was not so great that death was a probable consequence or (b) if the force used was dangerous, by showing that Beard was so drunk that he could

[76] 14 Cr. App. R. at p. 116.
[77] 14 Cr. App. R. at p. 187.

not realize the dangers of his conduct, and that he did not foresee the probable consequences of it. Beard's drunkenness could not be a defence in itself, but could only be evidence by which the presumption of intention or foresight could be rebutted. Now if there really was no doubt whatever that according to the law of England a death caused in the course of the commission of a felony was murder even if the felon did not foresee the chance of death, then it was a waste of time to discuss Beard's drunkenness unless it was so extreme that he did not know what he was doing, *i.e.* that he was so drunk that he did not realize that he was committing rape. This it was, on the evidence, quite impossible to establish. There was therefore in reality only one point for the defence and not two. It was essential to establish that the law had changed since the days of Foster; but this point was never adequately put to any of the tribunals before whom the case came. Instead, the attention of the tribunals was concentrated on the question of drunkenness. Now the C. C. A. in *Meade's Case*[78] had laid it down that the presumption that a man intends the natural consequences of his acts can be rebutted in the case of a man who is drunk by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.* likely to inflict serious injury.[79] The judge at the trial of Beard had left the point of drunkenness to the jury in language which the C. C. A. held 'imposes a test of the mind of the appellant less favourable to him than that of *Meade*, and is a direction which the Court in that case thought was calculated to mislead the jury. . . . Upon the direction of the judge it was impossible on the evidence to reduce the crime to manslaughter'. The C. C. A. therefore came to the conclusion that the verdict must be reduced to that of manslaughter. It would appear from the language used in the judgment that the C. C. A. did not precisely grasp the problem which was before them. If they were correct in their view of the law as to death caused in the course of commission of a felony, then the only way in which the principle of *Meade's Case* could be applied was by the judge leaving it to the jury to say whether Beard's drunkenness was such that he could not form the intention to commit rape, if there was any evidence on which the jury could take that view. But according to the House of Lords there was not sufficient evidence for this. 'My Lords, drunkenness in this case could be no defence unless it could be established that

[78] [1909] 1 K. B. 895.
[79] *Per* Darling J. at p. 899.

Beard at the time of committing the rape was so drunk that he was incapable of forming the intent to commit it, which was not in fact, and manifestly, having regard to the evidence, could not be contended. . . . In the present case I doubt . . . whether there was any sufficient evidence to go to the jury that the prisoner was, in the only relevant sense, drunk at all. There was certainly no evidence that he was too drunk to form the intent of committing rape.' [80]

The result of *Beard's Case* therefore is that the highest tribunal in the land, by laying down as they did the law as to death caused in the course of commission of a felony of violence, nullified all the progress in improving the law of murder which had been achieved during the past century. The rule which the House of Lords adopted is archaic, because it eliminates the mental element of malice aforethought in its modern meaning. The prisoner has only the thought of committing the felony: yet according to the law as laid down in *Beard's Case* he is to be sentenced to death although he never intended to kill anyone, or realized that he might kill anyone. This is a proposition so out of harmony with the ethical notions of ordinary men that it is difficult to imagine that an unbiased jury would consent to bring in a verdict of guilty, if for example the evidence established that a prisoner had seized a man with the intention of stealing forcibly from his person, but without any intention of hurting him, and had caused his death owing to the fact that he had such a weak heart that the slightest shock would be dangerous to him. It is significant that in *Beard's Case* the Home Secretary thought well to inform the House of Lords that in no case would the death sentence be carried out. Of course, throughout the world there is a strong prejudice against a person who has committed rape, at any rate when the victim is a white woman, and not regarded as racially inferior or a political opponent. Rape was indeed a capital offence until 1841 [81] and until that time there was no point in a meticulous argument if, in a case which had resulted in death, the indictment was for murder.

It is interesting to note that in *R.* v. *Gross* [82] where the prisoner had under provocation tried to kill A but by accident had killed B, this was held to be manslaughter. According, however, to the law as laid down in *Beard's Case* it is difficult to escape from the absurd conclusion that this should now

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[80] *Per* Lord Birkenhead L.C. at pp. 197 and 199.
[81] 4 & 5 Vict. c. 38.
[82] (1913) 23 Cox 455.

presumably be murder, as obviously it was a case of death caused in furtherance of a felony of violence, although it would be but manslaughter if he had killed the man he intended to kill.

A narrow adherence to the strict letter of the law when its doctrines run counter to the inherent sense of fairness which inspires common men, tends to bring the law, and its administration, into ridicule and dislike. Many years ago Foster wisely wrote[83]: 'Judges have often in favour of life given way to distinctions, which possibly might never have occurred to persons who have not made the law their special study. They have done so in favour of life: but they have very seldom done it, and I think never ought to do it, against the life of a man.'

No one nowadays can maintain that our Courts have no power to assist the development of new law by their decisions[84]: the House of Lords did in fact adopt in this very judgment a modification of the law as stated by Foster, by using the phrase 'felony of violence' instead of 'felony'. No authority was quoted for this phrase, and no definition of the word 'violence' was given. The law is, however, definitely laid down and no Court has the power to overrule a decision which has done so much to prevent the further logical and humane development of the law of homicide. It only now remains to hope that the Law Revision Committee may turn its attention to this branch of the criminal law and effect by legislation the improvement which is so much needed. It may be urged that the reforms above suggested are not of much practical importance: that it does not make much difference for example whether the accused person is convicted of manslaughter or of dangerous driving, and that death caused in furtherance of rape is rarely likely to happen, and if it does, then the matter can be dealt with by the exercise of the prerogative of mercy, and so on. There are two replies to such an argument. The first is that it is not the case that it makes no practical difference—for the present confusion may well result in acquittal both of manslaughter and of dangerous driving and so frustrate the purpose of the law to give protection to life; and even if the second charge be accepted by the jury, the deterrent effect of a conviction for manslaughter would have been greater than that of a conviction for dangerous driving. In the case of death involved in felony it may easily happen that cases will occur like that reported by Stephen,[85]

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[83] C. C. & C. L. Appendix, p. 420.
[84] *R.* v. *Manley* (1933) 24 Cr. App. R. 25; *R.* v. *Woolmington* (1935) 25 Cr. App. R. 72; *Duncan* v. *Jones* (1935) 52 T. L. R. 26.
[85] *Ante*, p. 57.

and it is unsatisfactory and inelegant to have a rule of law which, whenever it is applied, is either unnecessary (as in the case where dangerous violence is knowingly used) or unjust (as in the case where the risk of death is not foreseen).

THE LAW OF PROPERTY ACT, 1925, S. 130 (2).

S. J. Bailey.

'Expressions contained in an instrument coming into operation after the commencement of this Act, which, in a will, or executory instrument coming into operation before such commencement, would have created an entailed interest in freehold land, but would not have been effectual for that purpose in a deed not being an executory instrument, shall (save as provided by the next succeeding section) operate in equity, in regard to property real or personal, to create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before the commencement of this Act.'

AT the present day an entailed interest cannot arise in any kind of property unless an appropriate technical phrase (such as 'in tail' or 'and the heirs of his body') is used by the deed or will which seeks to create the entail.[1] Prior to the Law of Property Act, 1925, entailed interests were impossible in personal property, but could be created in real property either by deed or by will. If created by deed, technical words of limitation were essential. In a *will*, however, technical phrases were unnecessary, provided that the will showed a sufficiently clear intention to confer an entailed interest upon the devisee.

This relaxation of the strict rule, for the benefit of devises of real property, introduced an element of uncertainty into the interpretation of gifts by will; and even such unlikely expressions as 'to A *and his heirs*',[2] or 'to A *or his issue*',[3] or 'to A *and his male heir for ever*',[4] were sometimes construed, in deference to the context in which they appeared, as conferring an estate tail upon A.[5] In gifts of personalty, however, this difficulty never occurred, for no entailed interest could exist in personal property. Accordingly the Law of Property Act, 1925, attempted to simplify matters by enacting in section 130: (1) that after 1925 entailed interests can be created only by using those technical words of limitation which were already

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[1] Law of Property Act, 1925, s. 130 (1). A minor exception is allowed by sub-s. 3; but even this has been held to require formal words: *Re Jones* [1934] 1 Ch. 315.

[2] *Re Waugh* [1903] 1 Ch. 744; *Re Thomas* [1920] 1 Ch. 515.

[3] *Parkin* v. *Knight* (1846) 15 Sim. 83; *Re Clerke* [1915] 2 Ch. 301; *Re Hayden* [1931] 2 Ch. 333.

[4] *Silcocks* v. *Silcocks* [1916] 2 Ch. 161.

[5] Even a simple devise 'to A' might have this effect—*e.g.* when accompanied by a devise of the same land to B 'if A die and leave no issue': *Forth* v. *Chapman* (1720) 1 P. Wms. 663. But this was rare after the Wills Act, 1837, s. 29.

required in a gift by deed; and (2) that if any informal expressions, which were formerly sufficient for the purpose in a devise by will, are used in a document coming into operation after 1925, such expressions 'shall . . . operate . . . in regard to property real or personal, to create *absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before . . . this Act*'. Consequently, if one of these informal expressions, which operated in a pre-1926 devise to create an entailed interest, is inserted in a document to-day, its effect can be found only by inquiring what would have been the result had it been used in such a document [6] before 1926 with regard to *personalty*.

It is commonly supposed that any gift of personal property before the Act, in terms which would have conferred an entailed interest in the case of realty, gave the donee an absolute interest.[7] If this were correct, the effect of section 130 (2) would be perfectly straightforward; and one could state with confidence that whenever one uses any such informal expression to-day the donee acquires a fee simple or (if the property is personalty) an absolute interest.[7] Unfortunately, however, an absolute interest was not always, or even usually, the result of such a gift. It is true that a pre-1926 gift of personalty to A '*and the heirs of his body*' or to A '*in tail*' conferred an absolute interest upon A, whether the gift was by deed [8] or by will.[9] But this is not relevant to our problem; for such words are *technical* expressions which, had the property been realty, would have created an entailed interest even in a pre-1926 deed. Sction 130 (2) is in no wise concerned with such expressions. Its concern is solely with *informal* expressions, which would *not* have been sufficient for the creation of an entailed interest by deed, and which are therefore incapable at the present day of creating an entailed interest even by will.

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[6] Presumably the word 'therein', as used by sub-s. 2, relates to the 'instrument' in which the expression occurs—despite the intervening words 'will' and 'deed'; for these intervening words appear merely in subsidiary parenthetic clauses. See also the concluding paragraph of this article.

[7] *E.g.* Cheshire, Modern Law of Real Property, 3rd ed. pp. 362, 367; Williams on Real Property, 24th ed. pp. 124, 307-8; Goodeve and Potter, Modern Law of Real Property, p. 277; Rivington, Law of Property in Land, p. 101.

[8] *Re Aspinall's Settled Estates* [1916] 1 Ch. 15 ('in tail male'); *Re Twopenny's Settlement* [1924] 1 Ch. 552 ('in tail'); *Pole* v. *Pole* [1924] 1 Ch. 156 ('in tail'); Norton on Deeds, 2nd ed. 367-8.

[9] *Leventhorpe* v. *Ashbie* (1635) Rolle Abr. 831, pl. 1; *Seale* v. *Seale* (1715) 1 P. Wms. 290; *Chatham* v. *Tothill* (1771) 7 Bro. P. C. 453; *Dawson* v. *Small* (1874) L. R. 9 Ch. 651 ('and the heirs male of his body'); *Re Walker* [1908] 2 Ch. 705; *Portman* v. *Portman* [1922] 2 A. C. 473 ('in tail'); *Re Lowman* [1895] 2 Ch. 348; *Re Sturt* [1922] 1 Ch. 416 ('in tail male').

In this article it is proposed to examine three informal expressions—' and his issue ', ' and his descendants ', ' and his children '—in order to ascertain in what circumstances they were formerly capable of conferring an entailed interest, and what was their effect when attached to a bequest of personalty. From this material one can then deduce the consequences of employing them in a modern gift.

Before attempting to consider their individual peculiarities, one general observation should be made. Each of these informal phrases, as one would naturally expect, is to be found in many different contexts. The simplest case occurs when the phrase follows directly after the words of gift to A (*e.g.* ' To A and his issue '), unhampered by any qualifying or explanatory clauses. But sometimes other words intervene (*e.g.* ' To A and *to* his issue ', or ' To A and *after his death to* his issue '); or there may be supplementary directions as to the destination of the property (*e.g.* a gift over in case A dies without children, or on failure of his issue); or the rest of the will may contain something which throws some light upon the meaning of the phrase. At times, moreover, several of these factors occur together. Fortunately, the Courts do not treat each of these conceivable cases as a separate problem in itself—unrelated to any general rule. Thus, whenever the gift is to A and his ' issue ', whether or not there are intervening or additional words or phrases, one can be certain that the gift will be interpreted as though it were simply ' to A and his issue ' unless the accompanying words or phrases clearly show that the testator intended a different result.[10] This is equally so when such words as ' descendants ' or ' children ' are employed in a gift. Accordingly, each of these informal phrases has, as we shall shortly see, a *prima facie* interpretation; and this interpretation will prevail in every case unless the testator has ousted it by expressing a contrary intention in his will.[10] As Lord Cranworth observed, in 1858, ' any established course of construction must give way to a contrary intention plainly apparent upon the face of the will. But unless there is something apparent upon the face of the will to the contrary, technical rules and ordinary canons of construction must prevail '.[11]

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[10] An exception occurred before 1926 in devises of freehold, by virtue of the rule in *Shelley's Case*, for a clear intention that A should take only for life with remainder to his issue (or descendants) was construed as giving simply an estate tail to A. But this rule has been abolished as regards devises which come into force after 1925 : L. P. A. 1925, s. 131. Note also that the rule in *Wild's Case (post)* is exceptional in that external circumstances are there regarded (the existence or absence of children) in order to ascertain the intentions of the testator.

[11] *Roddy* v. *Fitzgerald*, 6 H. L. C. 823, 871. Devise ' to A *for life* and *after his decease to* his lawful issue ', with a gift over on failure of the issue : *Held*,

1. Gifts by will to A and his 'issue'.

The number of decisions which have turned upon the effect of the word 'issue' is formidable; and, as Lord Eldon observed in 1820, 'the mind is overpowered by their multitude and the subtlety of the distinctions between them'.[12] Since that time, however, many of the more technical difficulties have been swept away, or at least have been rendered comparatively innocuous. Thus there is now general agreement that the primary meaning of the word (both in law and in popular usage) is *descendants of all generations*,[13] though the context of course will sometimes show that it must be interpreted in some more limited sense—*e.g.* as meaning *children* only.[14] Again, such complications as the rule in *Shelley's Case*,[15] and the artificial interpretation formerly applied to a gift over on the death of a donee without issue,[16] will seldom raise their heads again. Moreover, it appears now to be established that the word 'issue' is not subject to the rule in *Wild's Case*.[17]

A devise of real property to A and his 'issue' before 1926 normally conferred upon A an estate tail. Thus, in addition to

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equivalent to a simple devise 'to A and his issue', there being nothing to oust the general rule that 'issue' is *prima facie* construed as a mere word of limitation.

[12] *Jesson* v. *Wright* (1820) 2 Bli. 1, 20; quoted with approval in *Roddy* v. *Fitzgerald* (1857-8) 6 H. L. C. 823, 845.

[13] *Roddy* v. *Fitzgerald* (*supra*) at pp. 837-8, 881 (the statute *De Donis* used it in two senses); *Bradley* v. *Cartwright* (1867) 2 C. P. 511, 520; *Re Hopkins' Trusts* (1878) 9 Ch. D. 131, 134; *Re Hammond* [1924] 2 Ch. 276, 279—280; *Re Sutcliffe* [1934] 1 Ch. 219. Note that the opinion, *obiter*, of James L.J. in *Ralph* v. *Carrick* (1879) 11 Ch. D. 873, 883, that the popular meaning of 'issue' is simply *children*, was discountenanced by Sargant J. in *Re Burnham* [1918] 2 Ch. 196, 201.

[14] See authorities cited in note 13 (*supra*); also *Sibley* v. *Perry* (1802) 7 Ves. 522; *Carter* v. *Bentall* (1840) 2 Beav. 551; *Pruen* v. *Osborne* (1840) 11 Sim. 132; *Martin* v. *Holgate* (1866) 1 H. L. 175; *Edyvean* v. *Archer* [1903] A. C. 379; *Re Timson* [1916] 2 Ch. 362.

[15] Although abrogated by L. P. A. 1925, s. 131, in cases where it operated to confer a fee, it seems that s. 130 (2) retains the analogous rule which sometimes operated in bequests of personalty. *Ex p. Wynch* (1854) 5 De G. M. & G. 189 ousted this analogous rule when a clear intention was shown to give only a life interest to A, but does not appear to cancel it entirely. See pp. 210-12, 213-14; also Theobald on Wills, 18th ed. 539-41. Thus a gift by will, before 1926, 'to A *for life* and after to his issue *successively according to seniority*' conferred upon A an absolute interest in personalty (*Jordan* v. *Lowe*, 6 B. 350) and a fee tail in realty (*Shelley's Case*). After 1925 its effect for personalty is unaltered; but for realty it gives A a mere life estate [under s. 131]. See also note 40 (*post*).

[16] Wills Act, 1837, s. 29; henceforth such phrases are not to be construed as meaning an *indefinite* failure of issue unless the will shows that this was the meaning intended. This removes awkward decisions such as *Chandless* v. *Price* (1796) 3 Ves. Jun. 99 for wills made after 1837, unless an indefinite failure of issue is held to be intended—as in *Re Thomas* [1921] 1 Ch. 306.

[17] (1599) 6 Co. Rep. 16b. See *Pelham Clinton* v. *Newcastle* [1902] 1 Ch. 34, 41; *Re Cosby's Estate* [1922] 1 Ir. R. 120, 132. Originally the rule applied to 'issue'—probably because in those days the word signified 'children' only (*ibid.*); *Lovelace* v. *Lovelace* (1584) Cro. Eliz. 40. *Underhill* v. *Roden* (1876) 2 Ch. D. 494 assumed (incorrectly, *semble*) that it still applies. See also note 67 (*post*), and the paragraph to which it relates.

the natural presumption that the words 'and his issue' were intended to denote descendants of all generations, there was the more artificial presumption that those descendants were intended to take in succession and by inheritance from A.[18] In short, the words were regarded as *words of limitation*, equivalent to the technical phrase 'and the heirs of his body'.[19] Two reasons have been suggested for this somewhat arbitrary construction: 'it is either derived from the old law, which upon feudal principles was much directed against the successors to real estates taking otherwise than by descent,[20] or it rests upon the ground that the word issue taken *per se* includes all the issue, and that the best mode of effectuating the intention in favour of all the issue is to give an estate tail to the parent, which, in the course of devolution, would embrace them all'.[21]

For many years it was generally believed that the same presumption arose in bequests of *personal property* 'to A and his issue'.[22] But to construe the words 'and his issue' as words of limitation—equivalent to 'and the heirs of his body'—brought into play the established rule that a gift of personalty to a person coupled with words of inheritance conferred an absolute interest upon him. It therefore led to the grotesque result that A took the gift absolutely, and the words 'and his issue' gave the issue no legal benefit whatever. The alleged justification for this amazing argument, solemnly expounded by Courts whose professed function was to give effect to the intentions expressed by a testator in his will, lay first in the idea that it would be improper to construe identical words differently according as they concerned real or personal property, and secondly in a supposed immutable rule of law whereby any words attached to a gift of personalty were bound to carry an absolute interest if they would give an estate tail in real property.[23] The first of these contentions erred in that it assumed that a devise of *realty*

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[18] *Roddy* v. *Fitzgerald* (1857-8) 6 H. L. C. 823, 879. In theory, a context which showed a contrary intention would exclude this construction. But in practice the only contrary intention commonly shown was that A should take the land merely for his life, with remainder to his issue after his death; and this, being governed by the rule in *Shelley's Case*, produced an estate tail for A as before (*ibid.*).

[19] *Roddy* v. *Fitzgerald* (*supra*); *Pelham Clinton* v. *Newcastle* [1902] 1 Ch. 34; [1903] A. C. 111; *Re Simcoe* [1913] 1 Ch. 552; *Re Lord Lawrence* [1915] 1 Ch. 129, 146 (C. A.).

[20] *E.g.* the old rule in *Shelley's Case*.

[21] *Ex p. Wynch* (1854) 5 De G. M. & G. 189, *per* Turner L.J. at p. 225.

[22] *Chandless* v. *Price* (1796) 3 Ves. Jun. 99; *Donn* v. *Penny* (1815) 1 Mer. 20; *Lyon* v. *Mitchell* (1816) 1 Madd. 467; also the cases cited by Lord Cranworth L.C. *Ex p. Wynch* (*supra*) at pp. 209-12.

[23] See the cases cited in the preceding footnote, and note that they were supported by Fearne on Contingent Remainders: *per* Plumer V.-C. *Lyon* v. *Mitchell* (*supra*) at p. 475.

'to A and his issue' was construed as an entail because the testator was taken to have intended an entail: in fact, it was so construed because this was the most convenient way of carrying out his evident intention to benefit the issue.[24] The second erred in that in fact no such rule of law existed: the rule was merely that since inheritable interests (in fee simple or in tail) were impossible in personal property, any attempt to create such an interest must fail; consequently it was only when a testator used words which were *clearly intended as mere words of inheritance* (*i.e.* as words of limitation) that the words were ignored and the bequest construed as absolute.[25]

Thus, whereas a gift of personalty coupled with obvious words of inheritance (*e.g.* To A *and the heirs of his body*) almost invariably conferred an absolute interest,[26] a gift to A 'and his issue' does not do so unless the context shows that inheritance was intended; for the phrase 'and his issue' does not of itself indicate that the issue are to take as *heirs*.

We now come to consider what in fact was the result, before 1926, of a bequest of personalty to A and his 'issue'—bearing in mind that this result controls the construction of such words even for real property in every gift by the will of a testator who dies after 1925.[27] The law was stated by Parker J., in 1908, as follows: 'That the word "issue" may in gifts of personal property be a word of limitation no one doubts, but, in my judgment, whether it be so or not is purely a question of construction on each particular instrument, the Court which has to interpret such instrument being unfettered by any general rule. Indeed, by a gift of personalty to A and his issue, it seems to me more likely that a testator means the issue to take jointly with or by substitution for A than that A should take to the exclusion of his issue, and when there are words of division, such as a gift to divide between A and his issue, it is, in my judgment, almost conclusive that the word "issue" cannot be used as a word of limitation.'[28] Consequently, the Court is perfectly free to construe such words according to the evident intentions of the testator gleaned from a perusal of his will, biased (if at all) only by the natural suspicion that some definite interest was intended for the issue—since it is more likely that the testator

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[24] *Roe* v. *Green* (1767) 2 Wils. 322, 323; *Ex p. Wynch* (1854) 5 De G. M. & G. 189, 225; *Re Coulden* [1908] 1 Ch. 320, 323—quoted with approval in *Re Hammond* [1924] 2 Ch. 276, 280.

[25] *Ex p. Wynch* (*supra*) at pp. 206-7; 211-12, 224.

[26] See cases cited in notes 8 and 9 of the introductory section of this article.

[27] S. 130 (2) of L. P. A. 1925 applies only to instruments 'coming into operation after the commencement of this Act'.

[28] *Re Coulden* [1908] 1 Ch. 320, 324.

mentioned issue in order to benefit them than that he did so only in order to show what kind of interest he wished to give to A.[29]

Thus, in *Re Hammond* [1924] 2 Ch. 276, where personalty had been bequeathed 'equally between my two daughters . . . and their respective issue', Tomlin J. applied this test, and found that the testator's evident intention was to give two equal shares—one for each daughter and her issue—and that in each case the daughter and her issue took their share *concurrently*. He did not decide whether each daughter took *jointly* or *in common* with her issue; but no doubt the ordinary rule as to concurrent interests applies to all such cases—*i.e.* they are presumed to be joint unless 'words of severance' are present showing that the donees are intended to take in common.

It is believed that a bequest 'to A and his issue' naturally implies not only that the issue are intended to receive a direct benefit from the gift (*i.e.* that the word 'issue' is a word of purchase—not merely a word of limitation), but further that the issue are intended to benefit contemporaneously with A.[30] Thus it is probable that the decision in *Re Hammond*, whereby each daughter took concurrently with her issue, is the natural interpretation of such a gift. It is evident, however, that such words, with some slight assistance from the context, could easily suggest that the issue were intended to participate only after A's death—and might then be construed to mean 'to A for life and *after his death* to his issue equally'. This construction was adopted by the Court of Appeal in Chancery in the leading case of *Ex p. Wynch* (1854), where the bequest was 'to my good and virtuous friend Anna Maria Mealy for her life and the issue of her body'.[31]

One further question naturally arises from the above. We have seen that 'issue' normally means descendants of every degree, and that under a bequest 'to A and his issue' the issue normally take concurrently with A. Does this mean that every remote descendant—though yet unborn—will share in the gift? Clearly this would be utterly impracticable. Consequently, a presumption exists (equally applicable to all gifts to a class of

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[29] It is submitted that Parker J.'s decision on the *facts* of this case was unsatisfactory. The bequest was 'to be divided equally [at the death of the executors] between my then surviving children and *their* respective issue'. He construed it as intending an equal division among surviving children and the issue of those who *had died*.

[30] Hawkins on Wills, 3rd ed. pp. 241-2.

[31] 5 De G. M. & G. 189. No decision was required or given as to *what* interest the children took *inter se*. The question was simply whether or not they took an interest by purchase. See also *Knight* v. *Ellis* (1789) 2 Bro. C. C. 570 ('to A for life and after his death to the issue male of his body'); *Goldney* v. *Crabb* (1854) 19 Beav. 338 (similar).

persons) that only those of the issue who have come into being when the gift matures are intended to benefit. Hence an immediate bequest 'to A and his issue' usually benefits only those of his issue who are in existence when the testator dies; but if there is reason to construe it as a gift 'to A for life and *afterwards* to his issue' the issue can claim nothing until A's death, and consequently all who are born before A dies will be entitled to participate.[32] It should be noticed, moreover, that those of the issue who so qualify for a benefit under these gifts are equally treated whether they are near or remote descendants of A—*i.e.* they take their benefits *per capita*.[33] Thus if the claimants include a spinster daughter of A, his married son, and the son's ten children, each of the twelve takes an equal share. Yet, as one might expect, wills frequently show that the issue are intended to share in families ('*per stirpes*'), and when this is the case each child of A shares equally, and the issue of a child do not participate in the gift unless when the gift matures that child is dead—whereupon they divide his share between them.[34]

Summary.

Let us now summarize the above conclusions, and deduce from them the existing law:—

I. A bequest of *personalty* to A and his 'issue', whether before 1926 or at the present time, normally gives the property absolutely to A concurrently with his issue.[35] But the context may produce a different result either (i) by exhibiting an intention to give A a mere life interest with remainder to his issue[36] absolutely, or (ii) by showing that 'issue' was used merely as a word of limitation or inheritance—in which case A takes absolutely and his issue take nothing. As Lord Hardwicke said, nearly 200 years ago: 'The word issue is capable of three senses. In one sense as a word of description to take in joint tenancy. In another as a word of limitation. And in a third as a description of the persons in remainder.'[37]

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[32] Apparently this was the rule even in 1585: *Lovelace* v. *Lovelace*, Cro. Eliz. 40, *per* Coke (*arg.*) in *Perrott's Case*, Moore's Reports, pp. 371-2. See also Hawkins on Wills, 3rd. ed. ch. vii.

[33] *Davenport* v. *Hanbury* (1796) 3 Ves. 257; *Leigh* v. *Norbury* (1807) 13 Ves. 340.

[34] *Ralph* v. *Carrick* (1879) 11 Ch. D. 873, 874; Theobald on Wills, 8th ed. 332-6; *Re Coulden* [1908] 1 Ch. 320 ('equally among my children and their *respective* issue'); *Re Rawlinson* [1909] 2 Ch. 36 ('in equal shares according to the parent stock').

[35] Including (if an *immediate* bequest) only such issue as are in existence when the testator dies.

[36] Including such issue as are in existence when the testator dies *and* any others who come into existence before the death of A.

[37] *Lampley* v. *Blower* (1746), 3 Atk. 396, 397.

II.—(a) A devise of *realty*, before 1926, to A and his 'issue' gave A an estate tail unless there was an evident intention to the contrary.

(b) Such a devise, after 1925, in terms which would formerly have given an estate tail to A, has the same effect—by reason of section 130 (2) of the Law of Property Act—as though it were a bequest of personalty. (See I, above, substituting 'in fee simple' for 'absolutely'.)

(c) A devise to A *for life* with *remainder* to his issue, though equally within the rules specified above, may possibly deserve special mention. Before 1926 (in consequence of the Rule in *Shelley's Case*) it gave an estate tail to A.[38] Similar words employed in a bequest of personalty would, unless the will showed a contrary intention, have given A a mere life interest with remainder to his issue jointly.[39] Hence this is the effect to-day, both for real and for personal property. This result follows naturally from the rule imposed by section 130 (2). In this one case, however, section 131 of the Act adds a reservation. It strictly prohibits one from construing 'issue' here as a word of limitation, however clearly the will may show that it was so intended.[40]

2. Gifts by will to A and his 'descendants'.

We have already seen that judges have been prone to define 'issue' by explaining that its normal meaning is 'descendants'. It therefore appears to follow that our conclusions as to the effect of a testamentary gift to A and his 'issue' are equally applicable to a gift to A and his 'descendants'. Curiously enough, there was apparently no direct authority upon the effect of a devise of real property 'to A and his descendants' until 1929. In that year, however, Clauson J. decided that such a gift, by the will of a testator who died before 1926, conferred an estate tail upon A.[41] Meanwhile, of course, the law had been altered by section 130 of the Law of Property Act, 1925; and had the testator died after 1925 such informal words would have been incapable of creating an entail.

The only respect in which the word 'descendants' appears to be peculiar is that, unlike the word 'issue', it is not easily

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[38] *Roddy* v. *Fitzgerald* (1857-8) 6 H. L. C. 823.

[39] *Ex p. Wynch* (1854) 5 De G. M. & G. 189.

[40] S. 131 applies to the word 'issue' only when so used that it would, before 1926, have operated to confer a fee by virtue of the rule in *Shelley's Case*. 'Issue' is the only informal word to which this section applies. S. 130 (2) contains a saving clause (in parenthesis) which empowers s. 131 to intervene in this one case. See also note 15 (*supra*).

[41] *Re Sleeman* [1929] W. N. 16.

restricted by a context so as to mean simply 'children'. As was said by James L.J. in *Ralph* v. *Carrick*[42]: 'Descendants means children and their children and their children to any degree, and it is difficult to conceive any context by which the word "descendants" could be limited to children only.' It therefore follows that a devise 'to A and his descendants' was singularly apt for the creation of an estate tail.[43]

Presumably a bequest of *personalty* 'to A and his descendants' (and consequently any similar devise of realty by a testator who dies after 1925[44]) usually confers an absolute interest upon A concurrently with such of his descendants as are in existence at the date of the testator's death—on precisely similar rules to those already described for gifts 'to A and his issue'. Unfortunately there is as yet no reliable authority on the point[45]; but this conclusion seems to follow from the many judicial *dicta* to the effect that issue and descendants ordinarily have the same meaning.[46]

3. Gifts by will to A and his 'children'.

The word 'children' resembles the word 'issue' in that it is flexible in its meaning.[47] Moreover, like 'issue', the only two senses in which it is commonly used are (i) to signify descendants of the first generation, or (ii) to signify descendants of every generation.[48] Indeed, the sole fundamental distinction between the two words is that the more natural (or 'primary') meaning of 'issue' is descendants of every generation, whereas that of 'children' is descendants of the first generation only.[48] Accordingly each bears its primary meaning except where there is sufficient evidence to show that it is used in the less usual sense.

The natural consequence of this is that, in a gift by will 'to

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[42] (1879) 11 Ch. D. 873, 883.

[43] It follows also that such a devise cannot be affected by the rule in *Wild's Case*. See note 67 (*post*), and the paragraph to which it relates.

[44] L. P. A. 1925, s. 130 (2).

[45] In *Bird* v. *Webster* (1853) 1 Drew. 338 Kindersley V.-C. was clearly of opinion that such a bequest gives an absolute interest to A. But his judgment rested on the assumption that any words which would create an entail in realty give an absolute interest when applied to personalty; and on this point he was overruled by the Court of Appeal in *Ex p. Wynch* (1854) 5 De G. M. & G. 189 at pp. 212-13, 223.

[46] It is conceivable, however, that these words may be considered to savour more strongly of inheritance than the words 'and his issue'; in which case a presumption will arise that they are words of limitation even when attached to a bequest of *personalty*. If so their ordinary effect in a modern will would be to give an absolute (or fee simple) interest to A alone. S. 131 of the Law of Property Act does not cover 'descendants'. See note 40 (*supra*).

[47] *Byng* v. *Byng* (1862) 10 H. L. C. 171, 177.

[48] *E.g. Bowen* v. *Lewis* (1884) 9 App. Cas. 890 at pp. 897, 905, 915; *Clifford* v. *Koe* (1880) 5 App. Cas. 447, 452 ('children'). *Re Birks* [1900] 1 Ch. 417 (C. A.) at p. 420 ('issue').

A and his children', the words 'and his children' are always presumed to be words of purchase (conferring individual interests upon the children), unless there is some special reason for construing them as words of limitation inserted merely in order to give an inheritable interest to A; for the latter construction involves the supposition that the words mean 'and his descendants of *every* generation'. This is so, whether the subject-matter of the gift is real or personal property.[49]

What, then, is the nature of the interest which such children take? The established presumption in every case is that the testator intended them to take the property jointly with A.[50] Here, as elsewhere, manifestations of a contrary intention evident from a perusal of the will may justify a different construction. Thus the addition of words of severance (*e.g.* 'in equal *shares*') would lead to tenancy in common.[51] Other words in the context may show that A was intended to take for life only, with remainder to his children absolutely.[52] Occasionally, moreover, as we have already seen, there is something in the will which shows that 'children' was used to denote descendants of every degree: it is then equivalent to 'issue'; consequently, if the gift is a devise of realty, a presumption will arise that the words are words of limitation to be construed as conferring an entailed interest—or, after 1925, by ascertaining what those words would give in a bequest of personal property.[53] This construction was rare, but occurred in several obvious cases—such as devises to A 'and his children *in succession*'[54] or to A 'and her children *for ever*'.[55] In the absence of such indications to the contrary, however, the established rule is simply that A and his children take the property jointly.[56]

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[49] *Buffar* v. *Bradford* (1741) 2 Atk. 220, 222 (personalty), followed in *Webb* v. *Byng* (1856) 2 K. & J. 669, 672 (realty). See also *Ward* v. *Ward* [1921] 1 Ir. R. 117, 119.

[50] *Clifford* v. *Koe* (*supra*), *per* Lord Hatherley at p. 462 (realty); *Newill* v. *Newill* (1872) 7 Ch. App. 253 (personalty). There are many other decisions to the same effect—*e.g. Re Davies' Policy Trusts* [1892] 1 Ch. 90; *De Witte* v. *De Witte* (1840) 11 Sim. 41.

[51] *E.g. Re Owen's Trusts* (1871) 12 Eq. 316. As to the question *which* of the children will take, the rules are similar to those stated *supra* (as to 'issue'). See *e.g. Morse* v. *Morse* (1829) 2 Sim. 485; *Cunningham* v. *Murray* (1847) 1 De G. & Sm. 366.

[52] *E.g.* 'to A for life and afterwards to her children': *Re Jones* [1910] 1 Ch. 167. See also *Re Seyton* (1887) 34 Ch. D. 511 and the cases there cited; *Mason* v. *Clarke* (1853) 17 Beav. 126, 131.

[53] L. P. A. 1925, s. 130 (2); *supra*, *s. t.* devises 'to A and his issue'.

[54] *Re Buckton* [1907] 2 Ch. 406.

[55] *Ward* v. *Ward* [1921] 1 Ir. R. 117 (C. A.).

[56] The earlier decisions showed some uncertainty (since removed) as to the proper course to adopt. Thus in *Ward* v. *Grey* (1859) 26 Beav. 485 a testator's endeavours to carry out 'the last legacy of Nelson to his country' by providing that all legatees shall contribute 1 per cent. of their legacies 'to Mrs. Horatia

Finally, a devise of real property ' to A and his children ' is sometimes affected by the *Rule in Wild's Case*,[57] whereby, if A has no children at the *date of the will*,[58] and the will itself contains nothing to negative the ordinary presumption that A and his children are intended to take concurrently,[59] the words ' and his children ' were taken as words of limitation equivalent to ' and his issue ',[60] and A acquired an estate tail. The original reason for this rather artificial construction lay in an ancient rule whereby no person could benefit from an immediate gift unless he was in existence when that gift was made.[61] Hence the only means of enabling an immediate devise to carry the property to A's future children (as the testator evidently desired) was to construe it as an estate tail for A.[62] In modern times, however, a will does not operate until the testator's death; consequently exponents of the rule are inclined to seek some other justification for retaining the *date of the will* as the significant moment.[63]

The rule in *Wild's Case* is inapplicable if the will clearly indicates in what way the testator intended the ' children ' to benefit. Thus, if there is sufficient evidence in the will itself that A was intended to take an estate tail,[64] or that A was to

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Ward and her children ' was construed as giving her a life interest together with a power of appointment among the children. See also *Crockett* v. *Crockett* (1848) 2 Phil. 553.

[57] (1599) 6 Co. Rep. 16b. The rule is of even earlier origin. See *Lovelace* v. *Lovelace* (27 Eliz.) Cro. Eliz. 40, as explained in *Re Cosby's Estate* [1922] 1 Ir. R. 120, 132.

[58] *Byng* v. *Byng* (1862) 10 H. L. C. 171, 178; *Clifford* v. *Koe* (1880) 5 App. Cas. 447 at pp. 463, 468. In *Roper* v. *Roper* (1867) 3 C. P. 32 it was assumed (*semble*) that a child *en ventre sa mère* is insufficient, though subsequently born alive; but *Mason* v. *Clarke* (1853) 17 Beav. 126 and *Elliot* v. *Joicey* [1935] A. C. 209 suggest the contrary.

[59] *Byng* v. *Byng* (*supra*) at p. 178; *Roper* v. *Roper* (*supra*); *Bowen* v. *Lewis* (1884) 9 App. Cas. 890, 897. Thus even in *Wild's Case* (*supra*) the rule was not applied, since the devise there was to parents for life ' and *after their decease* to their children '.

[60] *Clifford* v. *Koe* (*supra*) at pp. 452-3, 468; *Bowen* v. *Lewis* (*supra*) at p. 897; 6 Co. Rep. f. 17a—b.

[61] 6 Co. Rep. f. 17a—b; Co. Litt. f. 9a; *Roper* v. *Roper* (*supra*) at p. 35; *Ward* v. *Ward* [1921] 1 Ir. R. 117, 123. See also note 62 (*post*).

[62] Since this reasoning applied only to an *immediate* devise, there was no real need for the rule in a *postponed* gift—*e.g.* to X for life and after his death to A and his children : *Buffar* v. *Bradford* (1741) 2 Atk. 220, as explained in *Byng* v. *Byng* (*supra*) at p. 178. Nevertheless, judicial definitions of the rule appear to assume that it is applicable even to a postponed gift; and the analogous rule for bequests of personalty has been applied to postponed bequests. See cases cited *post*, notes 68—70.

[63] *E.g.* Rivington, Law of Property in Land, p. 99. But the Lords in *Clifford* v. *Koe* (1880) 5 App. Cas. 447 were content to base their approval of the rule upon the fact that it was ' so long ago established and so constantly followed ' : at pp. 452, 462-3.

[64] *Byng* v. *Byng* (1862) 10 H. L. C. 171; *Ward* v. *Ward* [1921] 1 Ir. R. 117 (C. A.); *Re Hammond* [1924] 2 Ch. 276.

take for life with remainder to his children,[65] it will be unnecessary to turn to external circumstances (*i.e.* to ascertain whether A had any children when the testator made his will) in order to ascertain the true meaning of the gift.[66] From this it follows that the rule is never applicable to a devise ' to A and his *issue* '. For, as we have already observed, the presumption in such a case is that the testator intended thereby to confer an estate tail upon A; and the devise is construed accordingly, unless the will indicates a clear intention to the contrary. Consequently, a simple devise ' to A and his issue ' carried an entail to A without any assistance from *Wild's Case*—whether or not A had any issue at the date of the will; and if, by reason of some expression in the will, the devise indicated that some other result was intended, this very fact prevented the rule in *Wild's Case* from applying.[67]

The rule in *Wild's Case* was not applied to bequests of *personal* property. This decision was due to respect for the presumed intentions of the testator, since, if the words ' and his children ' were construed as words of limitation seeking to confer an entailed interest upon A, the result would be that A would take the bequest absolutely to the exclusion of his children—whereas the sole justification for the rule in *Wild's Case* was that it enabled future children to benefit. ' Therefore ', as was said by Lord Campbell L.C. in the leading case on this point, ' the same reason which, with respect to realty, requires that, under such words as are supposed in *Wild's Case*, the parent should take an estate tail, requires that when they are applied to personalty, the parent should take only an estate for life.' [68] Consequently, although in ordinary cases a bequest of personal property ' to A and his children ' confers it jointly upon A and the children,[69] the uniform tendency of the Courts if A had no

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[65] *Wild's Case* (1599) 6 Co. Rep. 16b; *Combe* v. *Hughes* (1872) 14 Eq. 415; *Re Jones* [1910] 1 Ch. 167. In such cases, the gift to the children being postponed until the parent's death, any born before the death are able to participate.

[66] *Byng* v. *Byng* (*supra*) at p. 177, *per* Lord Westbury L.C.; *Wild's Case* (*supra*) at f. 17b. The common explanation that the rule is ousted by evidence of a contrary intention is inadequate, in that it ignores the fact that the rule is not required when the will itself shows that an entail is intended.

[67] On similar reasoning, the rule cannot apply to a devise ' to A and his *children* ' if the will indicates that ' children ' is used in the wide sense as meaning issue. Presumably it would not be applied to a devise ' to A and his *issue* ', even when ' issue ' is clearly intended to mean children only; for such an intention is inconsistent with the supposition that the words are words of limitation.

[68] *Audsley* v. *Horn* (1859) 1 D. F. & J. 226, 237. Lord Campbell then stated that the supposed rule whereby any phrase which would create an entail in realty gives an absolute interest when applied to personalty is inapplicable in these cases. Presumably he thus overruled the decision of Knight-Bruce V.-C. in *Read* v. *Willis* (1844) 1 Coll. 86, which contains no *ratio decidendi*.

[69] *Mason* v. *Clarke* (1853) 17 Beav. 126.

children when the will was made is to construe it as a gift to A for life with remainder to his children absolutely [70]; for such a construction ensures that any child subsequently born during A's lifetime will be able to share in the gift.

Summary.

The conclusion, therefore, would seem to be that a gift by will to A 'and his children' before 1926 had precisely the same effect whether the gift was of realty or personalty, except that when applied to realty it might create an estate tail either (i) if the will showed a clear intention to use the words 'and his children' as equivalent to 'and his *issue*', or (ii) if, although the will itself showed no reason for doubting that A and his children were intended to take concurrently, the external circumstances revealed that A had no child when the will was made.[71] Except in these two cases the presumed intention of the testator was to benefit A and his children jointly.

Only in these two cases, therefore, is the position affected by the Law of Property Act, 1925. Since they operated in the past to give an estate tail in realty, they must now (if used in the will of a testator who died after 1925) be read as though the gift is a gift of personal property.[72] Consequently, in (i) A and his issue take jointly, unless the words are evidently intended as words of limitation or inheritance—in which case A alone is entitled.[73] In (ii), however, it appears that A takes merely for his life, with remainder to his children jointly. In all other cases the gift (whether a devise or bequest) is presumed to be a joint gift for A and his children, unless the will indicates a different intention.

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[70] *Morse* v. *Morse* (1829) 2 Sim. 485; *Gordon* v. *Whieldon* (1848) 11 Beav. 170; *Audsley* v. *Horn* (*supra*); also the cases cited by Romilly M.R. *ibid.* (1858) 26 B. 196, 199; *Grieve* v. *Grieve* (1867) 4 Eq. 180; *Clifford* v. *Koe* (1880) 5 App. Cas. 447, 453. This distinction is not made in Hawkins on Wills, 3rd ed. pp. 243-5; nor was it made in *Re Freeman's Trusts* [1925] 1 Ir. R. 27 (though the same result was reached on other evidence of intention). Hawkins (*op. cit.*) cites *Audsley* v. *Horn* (*supra*) as the leading case on the construction of bequests 'to A and his children', but appears to have overlooked the emphasis laid, by it and similar decisions, on the question whether children exist at the date of the will. He consequently leaves unexplained (and doubted) their ruling that A takes only a life interest (not jointly with the children), having missed the point that these were cases where there were no children when the will was made. *Read* v. *Willis* (*supra*) appears to have been overruled by *Audsley* v. *Horn* (*supra*), as also *Re Parkinson's Trust* (1851) 1 Sim. (N.S.) 242. In *Buffar* v. *Bradford* (1741) 2 Atk. 220, 222 the point was not taken, the parties having agreed that a joint bequest was intended.

[71] See *Bowen* v. *Lewis* (1884) 9 App. Cas. 890, 897.

[72] L. P. A. 1925, s. 130 (2).

[73] *Semble*, L. P. A. 1925, s. 131 never applies to 'children'; *supra*, note 40.

CONVEYANCES INTER VIVOS.

The authorities as to the appropriate interpretation of gifts by *deed* to A and his 'issue' or 'descendants' or 'children' are very scanty.[74] Their probable effects may be summarized as follows: (i) The natural meanings of these words are the same in a deed as in a will, and may be varied by the context. (ii) They are *always* construed as words of purchase—not as words of limitation intended to confer an estate tail upon A. (iii) Only such issue (or descendants or children) can benefit as are in existence at the date of the deed. (iv) They take jointly with A, unless the deed indicates that they are to take in common or in remainder. (v) These rules applied, before 1926, whether the gift was of real or of personal property.

If these are indeed the rules they are straightforward enough, and compare very favourably with the more complicated system of construction which, as we have seen, is employed in a gift by will. It is therefore satisfactory to observe that section 130 (2) of the Law of Property Act appears to have done nothing to disturb them. The sub-section clearly applies to gifts by deed, for its opening words embrace any 'instrument coming into operation after . . . this Act'.[75] Moreover, it undoubtedly deals with the phrases in question whenever they appear in such a context as permitted a devise of realty to confer an estate tail; for, as we have already seen, they are 'expressions contained in an *instrument* . . . which, in a *will*, . . . would have created an entailed interest in freehold land [before 1926], but would not have been effectual for that purpose in a deed . . .' The crux of the matter, however, lies in the words which follow: 'shall . . . operate . . . to create . . . interests corresponding to those which, if the property affected had been personal estate, would have been created *therein* by similar expressions before . . . this Act'.[76] Accordingly, when a phrase such as 'and his issue' is used in a deed at the present day, we are required to construe it (whether it concerns realty or personalty) in the same manner as it was construed when inserted in a pre-1926 gift of personalty by deed. And, since the effect of such a phrase before 1926 was substantially the same whether the property concerned was real or personal, the sub-section appears to have made no alteration in the law so far as gifts by deed are concerned.[77]

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74 See Norton on Deeds, 2nd ed. pp. 467, 473-4 for the existing authorities.

75 'Instrument' clearly includes both deeds and wills: s. 205 (1) (ii) and (viii).

76 The words are those of s. 130 (2), but the italics are mine.

77 Admittedly it makes one alteration—enabling a fee simple to arise in such

It is just conceivable that even gifts by *will* (when informal phrases such as 'and his issue' occur) should now be construed by reference to the rules formerly applied in a gift by deed. This turns on the meaning of 'therein' as used by the concluding words of sub-section 2 (above). Presumably 'therein' refers to the 'instrument' which one is attempting to construe—despite the fact that several subsidiary clauses intervene between the two words in the sub-section. On the other hand, it may conceivably relate to the supposed 'deed' which is mentioned in one of the intervening subsidiary clauses. But this latter alternative appears to have little to commend it, unless the fact that there are as yet few decisions on this aspect of the construction of deeds should be counted in its favour.[78]

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cases without strict words of limitation. But this result is already secured by s. 60 (1) of the Act.

[78] According to Co. Litt. 20b, '*semper proximo antecedente refertur*'. But it is generally agreed that 'every relative ought to be referred, not perhaps to the next antecedent which will make sense with the context, but to that to which the context appears properly to relate': *per* Lord Chelmsford, *Eastern Counties Ry.* v. *Marriage* (1860) 9 H. L. C. 32 at p. 74.

ABSOLUTE PROHIBITION IN STATUTORY OFFENCES.

R. M. Jackson.

IN all common law crimes, other than common nuisance,[1] it appears that some culpable mental element, or *mens rea*, is required. The mental element is 'culpable' in the sense that the *actus* is only criminal when it is coupled with a realization of the probable consequences of the act or omission.[2] In statutory offences this rule does not hold good; the *actus* may be prohibited in such language that a person may be liable for doing an act whether or not he did, or could, have foreseen the consequences. Such offences create what is commonly called Absolute Liability. Unfortunately our judges have used the expression *mens rea* in different senses. In this paper I use *mens rea* in its common law sense, and discuss at the end a meaning of *mens rea* that is now becoming common.

The position has been described thus: 'By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*. . . . But there are exceptions to this rule . . . and the reason for this is, that the Legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he has any *mens rea* or not, and whether or not he intended to commit a breach of the law.'[3] Many similar statements could be cited from judgments[4] and text-books.[5] The statutory offences of absolute

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[1] See Russell, Crimes, 8th ed. ii, 1696.

[2] See the article by Mr. J. W. C. Turner in this issue. I am in full agreement with Mr. Turner's conclusions.

[3] *Pearks, Gunston & Tee, Ltd.* v. *Ward* [1902] 2 K. B. 1, *per* Channell J. at 11.

[4] General statements will be found in these cases, some of which are discussed later:— *Cundy* v. *Le Cocq* (1884) 13 Q. B. D. 207, *per* Stephen J. at 210; *R.* v. *Tolson* (1889) 23 Q. B. D. 168, *per* Wills J. at 172; *Sherras* v. *De Rutzen* [1895] 1 Q. B. 918, *per* Wright J. at 921; *Derbyshire* v. *Houliston* [1897] 1 Q. B. 772, *per* Wright J. at 776; *Coppen* v. *Moore* [1898] 2 Q. B. 306, *per* Lord Russel C.J. at 312; *Parker* v. *Alder* [1899] 1 Q. B. 20, *per* Lord Russel C.J. at 25; *Williamson* v. *Norris* [1899] 1 Q. B. 7, *per* Lord Russel C.J. at 14; *Provincial Motor Cab Co. Ltd.* v. *Dunning* [1909] 2 K. B. 599, *per* Lord Alverstone C.J. at 603; *Moussel Bros. Ltd.* v. *L. & N. W. Ry.* [1917] 2 K. B. 836, *per* Atkin J. at

liability depend on the particular wording of the statutes by which they are created; the elements of each offence must be ascertained by construing the statute. Before considering definite cases it is desirable to state two rules of construction relating to penal statutes.

It has been held that penal statutes must be construed strictly. Blackstone says[6]: 'The freedom of our constitution will not permit that in criminal cases a power should be lodged in any judge to construe the law otherwise than according to the letter.' The idea of strict construction was used to mitigate the state of our criminal law at a time when capital offences were numerous, and was extended to all offences; this attitude may be praiseworthy from a humanitarian point of view, but it meant that the judges often did violence to the clear wording of statutes. The considerable reduction in the number of capital offences made by statutes in the nineteenth century[7] led to methods of interpretation that are more in accordance with the general principles of the construction of documents.[8] In 1863 Pollock C.B. observed that the distinction between a strict construction and a more free one had practically disappeared, and he added: 'If I were asked whether there be any difference left between a criminal statute and any other statute not creating a crime, I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law.'[9] In a more recent case it was said: 'We are dealing with a penal section, and therefore one must apply the well-known general rule of construction, that if there are two reasonably possible meanings the Court should adopt the more lenient one.'[10] A similar rule holds good where a statute affects the rights of persons generally: 'Statutes which encroach on the rights of the subject, whether as regards person or property, are

845; *Re Mahmoud and Ispahani* [1921] 2 K. B. 716, *per* Scrutton L.J. at 728, *per* Atkin L.J. at 731; *Law Society* v. *United Service Bureau, Ltd.* (1933) 98 J. P. 33, *per* Avory J. at 36. It was asserted by the Privy Council in *Bank of New South Wales* v. *Piper* [1897] A. C. 383 that *mens rea* is always necessary, but it was not a strong bench and in view of the authority to the contrary this case could hardly be followed.

[5] Russell, Crimes, i, 105; Archbold, Criminal Pleading, 29th ed. 21; Halsbury, Laws of England, 2nd ed. ix, sect. 3; Stroud, *Mens Rea*, 39.

[6] Bl. Comm. i, 92. At i, 88 Blackstone says that, 'Penal statutes must be construed strictly.'

[7] These statutes begin in 1827, and by piecemeal abolition had removed most of the capital offences by 1841; consolidation of these Acts took place in 1861. Stephen, History of the Criminal Law, i, 472.

[8] See Maxwell, Interpretation of Statutes, 7th ed. 1929, 226 *seq.*, and Craies, Statute Law, 3rd ed. 1923, 441 *seq.*

[9] *Att.-Gen.* v. *Sillem* (1863) 2 H. & C. 431, at 510.

[10] *Remmington* v. *Larchin* [1921] 3 K. B. 404 (C. A.), *per* Bankes L.J. at 408; Atkin and Scrutton L.JJ. to the same effect, Scrutton L.J. basing his view on a similar statement in *Tuck* v. *Priester* (1887) 19 Q. B. D. 629, 638.

similarly subject to a strict construction. . . . It is a recognized rule that they should be interpreted, if possible, so as to respect such rights.' [11] Apart from this 'bias' in favour of the subject, it appears that all statutes, penal and non-penal, are construed according to the same rules. 'Where the thing is brought within the words and within the spirit [of a statute], there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used; and the Court is not to find or make any doubt or ambiguity in the language of a penal statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.' [12]

It is of course to-day unquestionable that statute can override any rules of common law; doubts about the validity of statutes existed as late as Blackstone, and although these doubts no longer exist there is still a sense in which statutes are 'controlled' by common law.[13] It is a well-established rule that statutes should if possible be construed so as not to abrogate settled rules of law. 'It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law.' [14]

It follows from this last proposition that *prima facie* a penal statute should be construed so as to make *mens rea* an ingredient of any offence created, for that will be in conformity with the common law. Prior to 1875 such construction was usually adopted. Brett J. in *R.* v. *Prince* [15] reviewed many of the decisions on penal statutes, and in his dissenting judgment he arrived at the conclusion that there can be no conviction for crime in the absence of *mens rea*. He found that in cases of trespass in pursuit of game, piracy of literary and dramatic works, and under statutes to protect the revenue there had been convictions in the absence of *mens rea*, but he regarded these cases as not constituting true crimes.[16] The authorities for absolute liability cited by Brett J. can be amplified,[17] but he was

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[11] Maxwell, *op. cit.* 245, cited with approval by Kennedy L.J. in *Re Boaler* [1915] 1 K. B. 21 at 34.

[12] *The Gauntlet* (1871) 4 P. C. 184 at 191.

[13] C. K. Allen, Law in the Making, 2nd ed. 1930, Chap. VI, sects. iii and v, deals with the relation between the force of statutes and their interpretation.

[14] *R.* v. *Morris* (1867) L. R. 1 C. C. R. 90, *per* Byles J. at 95, quoted in Craies, *op. cit.* 279, where much further authority is cited. See also Maxwell, *op. cit.* 71.

[15] (1875) L. R. 2 C. C. R. 154.

[16] At 163.

[17] A clear case of absolute liability in an offence for protection of the revenue is *R.* v. *Woodrow* (1846) 15 M. & W. 404, *per* Parke B. at 417. *Fitzpatrick* v.

undoubtedly right in seeing such cases as very exceptional (at that date); the precedents for holding that statutory offences must be interpreted so as to import *mens rea* included numerous weighty cases. In the earliest of these, *Fowler* v. *Padget*[18] in 1798, Lord Kenyon C.J. said: 'It is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea.* The intent and the Act must both concur to constitute the crime. . . . I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences as would manifestly ensue from the construction contended for by the defendant.' Later cases are as emphatic, except that references to natural justice had ceased to be fashionable.[19]

The turning point in judicial thought appears to be the actual decision in *R.* v. *Prince.*[15] By 24 & 25 Vict. c. 100, s. 55, 'Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father . . . shall be guilty of a misdemeanour. . . .' Prince had taken an unmarried girl under the age of sixteen out of the possession and against the will of her father, but he believed on reasonable grounds that she was over sixteen. He was convicted, and the conviction was upheld by fifteen judges, Brett J. dissenting. The judgment delivered by Blackburn J.,[20] nine other judges concurring, is based upon the plain wording of the statute; it is pointed out that there is no reason to add to the wording of the statute, for it clearly meant that he who takes a young woman out of the custody of her father must take the consequences if she proves to be under the age provided. There is here no discussion of *mens rea,* for on this interpretation it is irrelevant. Bramwell B. delivered a judgment concurred in by seven other judges,[21] and whilst following the same line of argument as Blackburn J., he considered that as the act was 'wrong' there

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Kelly (1873) L. R. 8 Q. B. 337 begins the rule of absolute liability on the sale of adulterated food or drink.

[18] 7 T. R. 509; the statute made it an act of bankruptcy for a trader to depart from his house 'to the intent or whereby his creditors may be defeated or delayed', and the Court held that (bankruptcy being then treated as a criminal matter) a man who had departed from his house and thereby delayed his creditors had not committed the offence unless he had that intention.

[19] The cases cited by Brett J. in *R.* v. *Prince, op. cit.*, include nearly all the relevant precedents: his discussion (at p. 162) of *R.* v. *Marsh* (1824) 4 D. & R. (K. B.) 261 is open to question. *Bowman* v. *Blyth* (1856) 7 E. & B. 26, where Lord Campbell C.J. refused to construe a statute so as to exclude *mens rea,* could be added to his list.

[20] At 170. This is the majority judgment, but it is omitted in Kenny, Cases on Criminal Law.

[21] At 173. Denman J. agreed with the last two judgments; he held that Prince had done the very act prohibited, and that it was done 'unlawfully' because that means 'without lawful excuse'.

actually was *mens rea*. The *ratio decidendi* of the case is clearly that Prince had done an act absolutely prohibited by the statute; this is the explanation given in cases shortly afterwards,[22] and that explanation has been repeated recently[23]; the views on *mens rea* were merely *dicta*.

In several cases soon after *R.* v. *Prince*[15] the Court accepted the view that statute had imposed liability irrespective of *mens rea*. In *R.* v. *Bishop* (1880)[24] the defendant was convicted on indictment for receiving two or more lunatics in a house that was not a registered asylum; five judges unanimously upheld the conviction, holding that the defendant's knowledge or its absence was immaterial because the words of the statute were clear and any other interpretation would frustrate the object of the Legislature. No authority was cited. In *Cundy* v. *Le Cocq* (1884)[25] the Court held that the offence under the Licensing Act of selling drink to a drunken person is an absolute prohibition. The defence contended that a requirement of *mens rea* must be imported into the statute, but this was rejected, Stephen J. pointing out that such an argument was impossible since *R.* v. *Prince*[15] and *R.* v. *Bishop*.[24] In the same way, a licensee is liable if gaming takes place on licensed premises to the knowledge of the person in charge: 'I think the meaning [of the statute] is that the landlord of licensed premises must prevent that which the Act prohibits from being done on his premises, and if he does not prevent it so much the worse for him.'[26] It was decided in 1892 that a defendant was liable under the Sale of Food and Drugs Act for selling adulterated milk when the adulteration was made by his servant acting against his orders.[27] In *Parker* v. *Alder* (1899)[28] the defendant was convicted of selling adulterated milk although the adulteration was made by a stranger during the transit of the milk by railway; Lord Russel C.J. said: 'This is one of the class of cases in which the Legislature has, in effect, determined that *mens rea* is not necessary to constitute the offence.'

Two points should be noted. *First*, it may be thought that

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22 *Cundy* v. *Le Cocq* (1884) 13 Q. B. D. 207, *per* Stephen J. at 210; *R.* v. *Tolson* (1889) 23 Q. B. D. 168, *per* Wills J. at 180 and *per* Stephen J. at 190; *Sherras* v. *De Rutzen* [1895] 1 Q. B. 918, *per* Wright J. at 921.

23 *R.* v. *Maughan* (1934) 24 Cr. App. R. 130, *per* Avory J. Yet Kenny, Outlines of Criminal Law, 14th ed. 42, suggests that the conviction was upheld because 'the circumstances actually known to the prisoner made his conduct not merely immoral but also illegal'. See note 20.

24 5 Q. B. D. 259.

25 13 Q. B. D. 207.

26 *Bond* v. *Evans* (1888) 21 Q. B. D. 249, *per* Stephen J. at 257.

27 *Brown* v. *Foot* (1892) 66 L. T. (N.S.) 649.

28 [1899] 1 Q. B. 20.

the cases cited in the last paragraph really depend on negligence. It is true that if the receiver of lunatics, the publican, and the seller of milk had used greater care they might not have done the acts which led to their conviction; the advice from their solicitor and friends was doubtless that they should be more careful in the future. But this does not mean that liability rests on negligence. If we say that there was negligence, that is our own interpretation of the facts; if we then combine this interpretation with the result of the case, we are committing the vulgar error of inventing a *ratio decidendi* for cases where the true *ratio decidendi* is clear in the language of the judges. The point is, what must the prosecution prove, either by evidence or presumption, to establish the case: anything else (other than a statutory defence) is irrelevant in point of law to the question of guilty or not guilty. For instance, the Fertilisers and Feeding Stuffs Act, 1893, made it an offence for a seller to give a false description of fertilizers and feeding stuffs. A defendant sold cake meal as having 58 per cent. of oil and albuminoids, whereas the meal only contained 51 per cent. Prior to the sale the defendant had caused some of the fertilizer to be analysed and had relied on the analyst's report that there was 60.27 per cent of oil and albuminoid. The defendant had taken reasonable care, but since the prohibition was absolute he had no defence.[29] The present Fertilisers and Feeding Stuffs Act, 1926, s. 7 (1), provides a good example of a statutory defence. The sale or offer for sale or exposing for sale of feeding stuffs containing certain deleterious ingredients is an offence unless the defendant proves 'that he did not know and could not with reasonable care have known that the article contained a deleterious ingredient'. Such provisions[30] mean that the prosecution need prove only the commission of the act prohibited: the defendant is then liable unless he shows that he comes within the statutory exceptions. Where absolute liability has been created, and there are no statutory defences or the defendant does not come within them, evidence that the defendant acted in good faith and took reasonable care is useless as a defence although it may properly be given in mitigation of the penalty.[31] *Secondly*, the nature of every statutory offence depends on the

[29] *Laird* v. *Dobell* [1906] 1 K. B. 131, decided on the authority of *Korten* v. *West Sussex County Council* (1903) 72 L. J. K. B. 514.

[30] Sale of Food (Weights and Measures) Act, 1926, s. 12, provides an interesting list of statutory defences.

[31] Hawkins J. pointed out in *Brown* v. *Foot* (1892) 66 L. T. (N.S.) 649 at 652 that in deciding upon the penalty to be imposed the Court may consider any previous misconduct of the defendant, and, where the prohibited act is done by a servant, whether the defendant was a party to the act.

interpretation of the particular statute, and, since it has been established that statutory offences may dispense with *mens rea*, no useful purpose can be served by cataloguing cases where *mens rea* has and has not been imported into statutes. Precedents are now of use only if they help in the construction of particular statutes. This is often overlooked. In *R.* v. *Fitzgerald, Duke of Leinster* (1923) [32] the Court had to decide whether a bankrupt who obtained credit, without disclosing that he was undischarged, committed an offence under the Bankruptcy Act, 1914, s. 155, when he had reasonable ground for believing that information had been given to the creditor. It was argued for the appellant that *mens rea* was essential, citing *Sherras* v. *De Rutzen*.[33] Now *Sherras* v. *De Rutzen* decided that a particular section of the Licensing Act, 1872, requires *mens rea*, and the only reason for that decision was that the Court felt that any other construction would be too hard on publicans. The only interest of this case, except to publicans who have by mistake served drink to constables on duty, lies in the discourse by Wright J. upon instances where *mens rea* has been held unnecessary. Precedents that would be relevant in such cases are those on the canons of construction, which, apart from the 'bias' noted above, are the same for all statutes [34]; but since there are always some forty judges and even 'recent' decisions cover half a century, it is no use expecting to get clear guidance.

If we compare the position to-day with the position at the time of *R.* v. *Prince*,[15] it appears that:—

1. There is still a presumption that *mens rea* is essential. In 1921 Atkin L.J. viewed 'with some trepidation any tendency to diminish the importance of the rule as to *mens rea*'.[35] This is also shown by an unwillingness to allow that by-laws are valid if they impose liability for inadvertent acts, as appears in *London Passenger Transport Board* v. *Sumner* in 1935.[36]

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32 87 J. P. 191, in C. C. A. *per* Lord Hewart C.J.: 'In the opinion of the Court, whether you look at the terminology of the section or at its manifest purpose, there is an absolute obligation on the undischarged bankrupt to give information. . . .'

33 [1895] 1 Q. B. 918.

34 Of the cases within the scope of this paper, the best statement of principles of construction is by Atkin J. in *Moussel Bros. Ltd.* v. *L. & N. W. Ry.* [1917] 2 K. B. 836 at 845: the Court must consider 'the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed'. Cited by Lord Hewart C.J. in *Allen* v. *Whitehead*, 94 J. P. 18.

35 *Re Mahmoud and Ispahani* [1921] 2 K. B. 716 at 731.

36 99 J. P. 679, following *dictum* of Kay L.J. in *Lowe* v. *Volp* [1896] 1 Q. B. 256 at 259. These and other cases are discussed in L. T. News, Vol. 180, p. 306.

2. The Courts are more ready to assume that a statutory prohibition means an absolute prohibition, for this construction has been adopted in some cases without any argument being reported.[37] The tendency is also shown in decisions on bigamy. The well-known case of *R.* v. *Tolson* (1889)[38] decided that a *bona fide* belief on reasonable grounds that a spouse is dead constitutes a defence to a bigamy charge; the decision was largely based on the need, having regard to all the circumstances, to import *mens rea* into an apparently absolute prohibition. In *R.* v. *Wheat and Stocks* (1921)[39] the Court held that such a belief in a supposed divorce would not be a defence. The Court regarded the prohibition as absolute (subject to the proviso in the section), and limited *Tolson's Case* to a belief in the death of a spouse[40]; the contention that *mens rea* applies to bigamy generally was emphatically rejected. Another instance of absolute liability recently recognized is the offence of indecent assault on a girl under sixteen years of age.[41] The readiness with which the Court came to this conclusion on such a serious charge would have surprised the judges of fifty years ago. So long as proper use is made of nominal punishment in cases of inadvertent offences there seems no reason to object to such stringent provisions.[42]

3. As regards non-indictable offences it is not possible to assess the instances of absolute prohibitions. Unless offences come before the Divisional Court on a case stated there is no authoritative ruling. It is, however, difficult to read the word-

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[37] The Agricultural Wages (Regulation) Act, 1924, s. 7 (1) is an absolute prohibition (with a defence under s. 7 (6)); no other interpretation was contended for when the section was applied in *Hayes* v. *Curtis* (1928) 92 J. P. 119 and *Williams* v. *Smith* (1934) 98 J. P. 231. That liability under Friendly Societies Act, 1896, s. 84 (c) is absolute was assumed in *Windridge* v. *Ancient Order of Foresters* (1932) 96 J. P. 483; *R.* v. *Larsonneur* (1933) 97 J. P. 206, discussed below.

[38] 23 Q. B. D. 168.

[39] 15 Cr. App. R. 134.

[40] *R.* v. *Thomson* (1905) 70 J. P. 6 and *R.* v. *Connatty* (1919) 83 J. P. 292 decided that a reasonable belief that the prisoner's first marriage is invalid (void *ab initio*) is a defence; these are not appeal cases, and are of doubtful authority since *R.* v. *Wheat and Stocks*.

[41] *R.* v. *Forde* [1923] 2 K. B. 400 decided that the statutory defence (that the accused is twenty-three or under and believed on reasonable grounds that the girl was over sixteen) which is available in a charge of carnal knowledge is not a defence to a charge of indecent assault even when the indecent assault consisted of carnal knowledge: 'a boy who is tempted and induced to have carnal knowledge of a girl who misrepresents herself to be over sixteen, and who appears to be so, has no possible answer if he is charged with indecent assault and not with the full offence.' In *R.* v. *Forde* there was no discussion of *mens rea*, but this was raised in *R.* v. *Maughan* (1934) 24 Cr. App. R. 130, and it was held that the act is absolutely prohibited.

[42] Sentences of imprisonment in cases cited were: Larsonneur, three days: Wheat and Stocks, each one day; Maughan, two days.

ing of some modern statutes without concluding that it is now common to make absolute prohibitions. The prohibitions, for instance, of the Road Traffic Act, 1930, and the Regulations made thereunder, relating to the structure and condition of vehicles read as if absolute prohibition is meant,[43] whilst other offences are described in words which import *mens rea*.[44]

4. The expression *mens rea* is used in different senses. The state of a man's mind is relevant to finding out, first, if the act he did is to be imputed to him, and secondly, if he realized the probable consequences. It is the second inquiry which decides whether he had common law *mens rea*.[45] The first inquiry must be made in all cases. If, for instance, a butcher in a fit of somnambulism exposes tainted meat for sale in his shop, presumably he will not be liable for that offence, because the *act* is not considered in law to be imputable to him. It must be established that he knew that he was exposing the meat for sale, although it is irrelevant whether he knew, or could have known, that the meat was tainted.[46] It has become common for judges when dealing with absolute prohibitions to make statements such as 'the prisoner had done the thing which was forbidden by the statute, and that it was not necessary to prove any further *mens rea*'.[47] That is only another way of saying that the act must be one which can in law be imputed to the accused, and that that imputation is properly made when the accused intended to do what he did do. In this use (better described as a misuse) of the expression *mens rea*, our hypothetical somnambulistic butcher would have the defence that *mens rea* was absent (*i.e.* that the act was not imputable to him), although the offence does not require *mens rea* in the usual meaning of that term.[48] Hence great care must be used in considering the language used

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[43] It was decided in 1909 that liability for not illuminating a rear number plate is absolute: *Provincial Motor Cab Co. Ltd.* v. *Dunning* [1909] 2 K. B. 599.

[44] *E.g.* s. 112 (3), knowledge of falsity of insurance certificate; *Ocean Accident and Guarantee Corp. Ltd.* v. *Cole* (1932) 96 J. P. 191.

[45] See note 2, above.

[46] *Hobbs* v. *Winchester Corporation* [1910] 2 K. B. 46.

[47] *R.* v. *Maughan* (1934) 24 Cr. App. R. 130 at 132. See also *R.* v. *Wheat and Stocks* (1921) 15 Cr. App. R. 134, *per* Shearman J. at 135; *Cotterill* v. *Penn* (1935) 153 L. T. 377, shooting house-pigeons contrary to Larceny Act, 1861, s. 23: 'The element of *mens rea* is not required beyond the point that the facts must show an intention on the part of the person accused to do the act forbidden'; here the accused thought he was shooting at a wild bird.

[48] Kenny, Outlines of Criminal Law, 14th ed. 45 is most misleading. He says (dealing with absolute prohibitions) that for the *actus reus* an 'ordinary *mens rea* is still necessary. That is to say, the offender must have actually known that he went through the act of selling . . .' But Kenny gives no further indication that *mens rea* is here used in a peculiar sense. The passage is also mixed up with the supposition that liability in absolute statutory prohibitions rests on failure to take effective care to obtain knowledge of the circumstances, a view that is now quite untenable.

by the judges. Better phraseology was used in a recent case: 'It has been laid down over and over again that where a statute absolutely prohibits the doing of an act it is sufficient to show that the person accused did the forbidden act intentionally, and that it is not necessary to go further and show what is commonly known as *mens rea* or any intention other than to do the thing forbidden.'[49] Even this is not free from objection, because *first*, it suggests that the accused must have intended to do an act which he knew to be forbidden, whereas it may be that he intended to do (and thought he was doing) a different act, but it turned out that what he really did was forbidden by statute; *secondly*, it may not always be realized that the word 'intentionally' means no more than that the act must be imputable to the accused. Further, a statute may even be framed so that this imputability of acts is not necessary. In *R.* v. *Larsonneur* (1933)[50] the accused was convicted on indictment for that she '. . . being an alien to whom leave to land in the United Kingdom had been refused, was found in the United Kingdom' contrary to Orders made under the Aliens Restriction Acts, 1914 and 1919. The accused, a woman, was deported from the Irish Free State and arrived at Holyhead in police custody and was lodged in a police cell at Holyhead. She had no permission to land, and she was 'found [in a police cell] in the United Kingdom', so she was convicted, the jury expressing their opinion by a verdict of 'Guilty through circumstances beyond her control'. The conviction was upheld by the Court of Criminal Appeal on the ground that she satisfied all the requirements for the offence. It is a nice distinction: If being in a place is absolutely prohibited by statute, and you are taken to that place by physical compulsion, certainly you did not *go* there (for it was not your act), but if you are 'found' there it is no good saying that you did not *arrive* there.

The conclusion to be drawn is that in statutory offences nothing more, and nothing less, is required than that the statute should be carefully read and the rules of construction properly applied in each case.

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[49] *Law Society* v. *United Service Bureau, Ltd.* (1933) 98 J. P. 33, *per* Avory J. at 36.

[50] 97 J. P. 206.

In Memoriam.

PROFESSOR ALEXANDER PEARCE HIGGINS, K.C., C.B.E., F.B.A., M.A., LL.D.

These few words in memory of Professor Pearce Higgins are in no sense a formal obituary notice. His distinguished career has been recorded in many of these and in none with more grace and feeling than in Professor McNair's tribute in the British Year Book of International Law. Here we would rather dwell upon the loss of one of the most kindly men who ever taught in the Cambridge Law School. A notable feature of the Faculty nowadays is the accessibility of its members to the undergraduates and research students. It was not always so and several of us are old enough to remember a time when there was a gulf between professor and pupil that was not easily bridged. Not that it was intentional nor that it was the fault of anyone in particular; it was due to habits of thought peculiar to an earlier generation. Professor Higgins was one of those to whom in no small measure the change was due. He was always ready to help anyone, whether a colleague or a student and whether with his wide professional knowledge or with sympathetic advice in more intimate affairs. He was by nature eminently a 'clubbable' man, and his wide range of experience—Cambridge, Harvard, the London School of Economics, the War Colleges of the Royal Navy and of the United States, the Prize Court, The Hague, the Institute of International Law—greatly strengthened the human touch that was always so marked in him. At one time or another he presided over many assemblies, but over none with more conspicuous dignity and hospitality than a memorable meeting of the Institute of International Law in Cambridge. His loss will be keenly felt by his many colleagues and former pupils and by a multitude of other friends.

P. H. W.

CHARLES LYON-CAEN.

The death on September 17, 1935, of Professor Lyon-Caen at the advanced age of over ninety-one years terminated the career of a great lawyer who was admired and esteemed not only in the Latin countries but throughout the world. Born at Paris

on December 26, 1843, he became Professor of Roman Law in the University of Nancy in 1867, but his restless mind and highly practical outlook rebelled against the study of an ancient system, though in later life he was ready to extol the educational value of the severe discipline which is imposed both on the teacher and the student of Roman law. His transfer to Paris a few years later gave him fresh opportunities, and in 1875 he made his mark by a course of lectures delivered at the École Libre des Sciences Politiques which placed him in the front rank of French commercial lawyers. As is often the case on the Continent, his academic reputation carried with it a large consulting practice in matters calling for an expert knowledge of mercantile and maritime law. He held the Chair of comparative commercial law in the University of Paris for forty-eight years, and was also for many years 'Doyen' of the Faculty of Law in that University. His written work is considerable: in addition to his famous 'Traité de Droit Commercial', written in conjunction with his friend and colleague, Louis Renault, the great internationalist, he was the author of numerous monographs on commercial and comparative topics which are characterized by a lucidity of style, a sureness of judgment and a degree of erudition which have seldom been equalled and rarely surpassed.

To English lawyers Lyon-Caen was best known as a convinced and enthusiastic internationalist. The promotion of research in Public and Private International Law was his constant care, and he continued to preside over the Curatorium of The Hague Academy of International Law almost to the day of his death. He was also a firm believer in the value of the comparative method of legal research, and it was largely owing to his efforts that the study of comparative law gained a firm footing in the French Universities.

His death has removed a familiar and striking personality which until lately was prominent at all gatherings of lawyers of different nations. Lyon-Caen's mind was wholly free from any tendency to technicality. He cared little for shadowy abstractions, and was somewhat of a bogey to the fanatical civilians of his day who were content to stick to their texts and shunned contact with realities. To him law was an instrument for the bettering of human relations and not an end in itself. He was a living force in the development of law as a humanizing science both in France and elsewhere, and it is thus that his fame will endure.

H. C. Gutteridge.

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NOTES ON RECENT CASES.

CONSTITUTIONAL LAW—POLICE—DUTY TO PREVENT BREACHES OF THE PEACE —REASONABLE ANTICIPATION OF BREACH OF PEACE HELD SUFFICIENT JUSTIFICATION FOR ENTERING PRIVATE PREMISES.

Thomas v. *Sawkins.* [1935] 2 K. B. 249.

T. PROSECUTED S., a police constable, for assault. The magistrates dismissed the charge, and their decision was affirmed by the Divisional Court.

T., whose strong dislike of the police was well known to that body, had, during August, 1934, extensively advertised a meeting to which the public were given a free invitation. Before the meeting had begun three constables entered the hall, taking seats in the front row, despite protests by T. who gave his assurance that no breach of the peace would occur if the police withdrew. At the persistent refusal of the officers to comply with his demand he laid his hand on Inspector Perry to eject him, whereupon S. pushed T.'s hand from the officer. Neither party used more force than was reasonably necessary. No further attempt was made to eject the police and no breach of the peace occurred before or during the meeting other than that alleged in the summons.

T. contended that a police constable has no legal right to enter private premises in the mere belief—even if it be a reasonable belief—that a breach of the peace is likely to be committed there; and that S.'s entry was a trespass.

S. contended that his action was justified by the decisions or *dicta* in *Humphries* v. *Connor* (1864) 17 Ir. C. L. R. 1 (where a police officer's defence, that he had committed a technical assault in order to preserve the peace, was accepted); *O'Kelly* v. *Harvey* (1883), 14 L. R. Ir. 105; *Lansbury* v. *Riley* [1914] 3 K. B. 229; and *R.* v. *Queen's County Justices* (1882), 10 L. R. Ir. 294, 301. The Divisional Court accepted and applied these authorities.

Lord Hewart C.J. said (p. 255): "It seems to me that a police officer has, *ex virtute officii*, full right so to act [*sc.* to enter and remain on private premises] when he has reasonable ground for believing that an offence is imminent or is likely to be committed." In the opinion of the justices the police had had such grounds. The suggestion of trespass was remarkable since leave and licence had clearly been granted, for the officers, as members of the public, were deemed to be included in the general invitation.

Avory J. added that whilst it was undoubted that T. had the right to withdraw permission to attend from any individual who was likely to cause a breach of the peace, it was a very different proposition to withdraw the invitation from police officers, who were there for the express purpose of preserving the peace. He noted that in Stone's Justices' Manual (1935 ed. p. 208) it is stated that where a constable hears an affray in a house he may break in to suppress it. Hence, said the

learned judge: 'If he can do that, I cannot doubt that he has the right to break in to prevent an affray which he has reasonable cause to suspect may take place on private premises' (at pp. 255—256).

The appeal was lodged in order to test an announcement made by the Home Secretary in Parliament (in answer to questions raised about a turbulent Fascist meeting at Olympia), in which he stated that the police had no general right to enter private premises to prevent an affray occurring therein. The law on the point is now clearly enunciated, namely, that the police, besides having well-recognized powers to enter private premises without a warrant for the purpose of arresting a felon or a person reasonably suspected of a felony, or where they hear an affray on the premises, may also make a forced entry into private premises and remain thereon when they have reasonable grounds for suspecting that an affray is imminent or likely to be committed. This, it is suggested, is a logical exposition of the law in view of the fact that the police are expected to fulfil their duties of ward and watch and of keeping the King's Peace.

R. H. J.

[For another view of the case, see Professor Goodhart's article, *ante*, pp. 22—30.—Ed.]

Constitutional Law—Right of Appeal to the Privy Council—Irish Free State Legislature Held Competent to Abrogate the Right.

Moore v. *The Attorney-General for the Irish Free State.* [1935] A. C. 484.

The Irish Free State Legislature abolished the right of appeal to His Majesty in Council from Irish Free State Courts by the Constitution (Amendment No. 22) Act, 1933. The question before the Judicial Committee of the Privy Council was whether this Act was valid.

It was contended for the petitioners (1) that the Irish Legislature had no power to pass legislation inconsistent with the Treaty of 1921 between Great Britain and what afterwards became the Irish Free State; (2) that the Legislature had no power to diminish the royal prerogative by abolishing the Crown's power to grant leave of appeal.

The Judicial Committee held that the Constitution (Amendment No. 22) Act, 1933, was valid, and therefore that the petition must fail. Article 50 of the Irish Free State Constitution bars any amendment of the Constitution which is not within the terms of the Treaty of 1921, clause 2 of which was held in *Performing Right Society, Ltd.* v. *Bray U. D. C.* [1930] A. C. 377, to ensure specially the right to petition His Majesty in Council. In 1933 the Irish Parliament passed the Constitution (Amendment No. 6) Act amending Article 50 so as to remove this bar. On the validity of this Act, therefore, depended the effectiveness of the subsequent Act abolishing the right of appeal. The petitioners contended that the Constitution derived its existence solely from the operations of an Irish body, the Third Dail, which went out of existence, leaving, it was alleged, no successor having authority to amend the constituent Act. Their lordships rejected this contention, holding that the Constitution derived its validity from an Act of the Imperial Parliament, the Irish Free State Constitution

Act, 1922. The Court held that as the Statute of Westminster, 1931, empowered the Irish Legislature to pass Acts repugnant to an Imperial Act, they could legally abrogate part of the Treaty scheduled to the Irish Constitution Act. As to the argument that the amendment was invalid as purporting to diminish the prerogative, it was held that the prerogative is *pro tanto* merged in the Statute, and the Statute gives powers of amending and altering the statutory prerogative.

The Judicial Committee, in deciding that the right of appeal was effectively abrogated as a matter of law, expressly refrained from considering whether the Act of the Irish Free State, while legally valid, was a violation of the contractual obligation under which it lay by virtue of the Treaty with Great Britain. That Treaty is in an anomalous position. It is not one of international law, and each party has complete power, so far as law goes, to break it, but morality dictates that such an agreement should not be abrogated by unilateral action. As Mr. Baldwin remarked in the debate on the Statute of Westminster: 'That Treaty will be just as binding, so I am advised, after the passing of this Statute as before.'

R. N. G.

CONSTITUTIONAL LAW — RIGHT OF APPEAL TO THE PRIVY COUNCIL — CANADIAN LEGISLATURE HELD COMPETENT TO ABROGATE THIS RIGHT IN CRIMINAL CASES.

British Coal Corporation v. *The King.* [1935] A. C. 500.

The sole question before the Judicial Committee of the Privy Council was the validity of section 17 of the Canadian statute 23 & 24 Geo. 5, c. 53, which purports to abolish the right of the Crown to grant special leave to appeal from Canadian Courts to His Majesty in Council in criminal matters. The Court referred to *Nadan* v. *The King* [1926] A. C. 482, where a section of a Canadian statute in identical terms had been held invalid by the Judicial Committee on the grounds (1) that it was repugnant to Imperial Acts of 1833 and 1844 and therefore void under the Colonial Laws Validity Act, 1865; (2) that a Dominion statute could not have extra-territorial operation. But since *Nadan's Case*, the Statute of Westminster, 1931, has removed these two difficulties, and now these limitations are gone the Canadian Parliament's legislative competence is governed by the British North America Act, 1867, section 91 of which empowers the Canadian Parliament to make laws for the peace, order and good government of Canada. The King's prerogative can only be restricted by express words or necessary intendment, but section 91 by necessary intendment does invest the Dominion Parliament with power to prohibit the appeal to the King in Council, and section 17 of the Canadian Act 23 & 24 Geo. 5, c. 53 in precise terms abrogates this right. The Court therefore held that the Canadian Statute 23 & 24 Geo. 5, c. 53 was not *ultra vires*, and that the petition for leave to appeal in this criminal case must fail.

The Imperial Conferences failed to solve the question of appeals to the Judicial Committee, and were unable to recommend the inclusion of provisions expressly giving any Dominion the power to bar appeals in the

Statute of Westminster. Instead of responsibility being thrown where it belonged, the matter was shelved and left in a position of some legal obscurity. The above decision of the Judicial Committee does something to clear up the difficulty, though it leaves open the question of appeals in civil cases. The decision in *Nadan* v. *The King*, though inevitable, caused great annoyance in Canada. That the Supreme Court of Canada was unable to give a final decision in criminal matters has always been regarded in Canada as casting a slight on the competency of the Court, and the fact that the Judicial Committee have decided that its power of granting leave to appeal in criminal matters is abrogated cannot be viewed with regret.

R. N. G.

CONTRACT—BILL OF EXCHANGE—CHEQUE—ORAL AGREEMENT FOR SALE OF HOUSE—NO MEMORANDUM OR NOTE IN WRITING—PART PAYMENT BY CHEQUE—REPUDIATION OF AGREEMENT—ACTION ON DISHONOURED CHEQUE.

Low v. *Fry*. (1935) 152 L. T. 585.

F., THE defendant, orally agreed to buy back a certain cottage from L., the plaintiff, for £800. F. drew a cheque for £450, payable to L. as part of the purchase price and handed it to him. L. gave F. a receipt. There was thus no note or memorandum in writing of the agreement sufficient to satisfy section 40 of the Law of Property Act, 1925.

Later, on the same day, F.'s wife changed her mind about wanting the cottage back again, and thereupon wrote to L. as agent for her husband, repudiating the agreement. This repudiation did not reach L. before he had presented the cheque for payment. The cheque, having been stopped by F., was dishonoured.

L. sued on the cheque, and relying on the Bills of Exchange Act, 1882, s. 30, which provides that every party whose signature appears on a bill is, *prima facie*, deemed to have become a party thereto for value, put in the cheque, proved the signature of F. and left it to F. to endeavour to prove that there was no consideration. F. argued that as section 40 of the Law of Property Act, 1925, had not been satisfied and there was thus no enforceable contract, he would have been entitled to the return of the £450 had the cheque been met.

du Parcq J. gave judgment for the plaintiff. He followed *Jones* v. *Jones* (1840) 6 M. & W. 84. This was a case where the payees of a promissory note payable on demand brought an action of debt against the makers. The defence was that the promissory note was made and given by the defendants as purchase-money to be paid to the plaintiffs for the sale of a cottage and that as there was no note or memorandum in writing as required by section 4, Statute of Frauds, the contract did not amount to consideration or value for the defendants' promissory note. It was held, however, that this did not afford a defence to the action. Lord Abinger C.B. said (at p. 88): 'This is a case where the parties have paid their money down—or, what is equivalent, given a promissory note payable on demand—for a future conveyance. Can anybody say they are

not bound to pay it, unless they show that the plaintiffs have refused to execute the conveyance? I think this plea is clearly insufficient.'

In the present case the plaintiff was willing to convey.

The judge discussed *Casson* v. *Roberts* (1862) 31 Beav. 613, where it was held that where there was no contract, or no contract which could be enforced, a purchaser was entitled to a return of his deposit. But du Parcq J. said that it was not referred to in Leake on Contracts; that Quain J. in *Thomas* v. *Brown* (1876) 1 Q. B. D. 714 did not think the reasons upon which it proceeded were satisfactory; and that Horridge J. in *Monnickendam* v. *Leanse* (1923) 39 T. L. R. 445 declined to follow the decision. The learned judge was therefore satisfied that he ought to follow the decision in *Jones* v. *Jones*, and held that the plaintiff was entitled to judgment on the cheque for £450.

This case is of interest in that it reasserts that although a contract is unenforceable through non-compliance with section 40 of the Law of Property Act, yet it is not thereby invalidated and that, in particular, it may amount to consideration for the drawing of a bill of exchange.

C. D. P.

Contract—Frustration of Charterparty—Repudiation of Contract Due to Default of Repudiating Party Held Not to be Frustration.

Maritime National Fish, Ltd. v. *Ocean Trawlers, Ltd.* [1935] A. C. 524.

The X Co. chartered to the Y Co. the steam trawler *St. Cuthbert*, fitted with an otter trawl and to be used for fishing purposes only. This agreement was subject to annual renewal, failing three months' notice of discontinuation, and, at the last renewal, both parties were aware of a Canadian statute prohibiting the use of an otter trawl without a licence from the Ministry of Fisheries. Subsequently, such licences were granted to the Y Co. for three only of their five vessels, with leave to choose the vessels to be licensed: they did not, however, choose the *St. Cuthbert*. They then claimed that the charterparty was no longer binding, its performance being rendered impossible by refusal of the licence.

The Supreme Court of Nova Scotia en Banco reversed the decision of the Court below, and decided in favour of X. The Judicial Committee affirmed that decision. They pointed out that *Bank Line, Ltd.* v. *Arthur Capel & Co.* [1919] A. C. 435 would not apply, since here the shipowners were able and willing to place the vessel at the charterers' disposition, whereas in the latter case they were precluded by governmental action from so doing. Lord Finlay had questioned in *Larrinaga* v. *Société Franco-Américaine des Phosphates* (1922) 29 Com. Cas. 1 the decision in *Krell* v. *Henry* [1903] 2 K. B. 740, where it was held that a contract to let a window for King Edward VII's coronation procession was dissolved by postponement of the procession, because the procession was the basis of the contract. The Judicial Committee thought that *Krell* v. *Henry* certainly ought not to be extended. They favoured the view of Lord Sumner, in *Hirji Mulji* v. *Cheong Yue Steamship Co.* [1926] A. C. 497, that the parties, being aware that the licence might be refused, could have themselves made the agreement conditional on its issue. Why, then, should the Court imply a condition exempting Y from liability for a

contingency which they should have contemplated and against which they might have protected themselves? But they declined to commit themselves to adopting this as a *ratio decidendi*, and based their decision upon another ground. They quoted Lord Sumner, in *Bank Line* v. *Arthur Capel* (*supra*): 'The principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side'; and Lord Blackburn, in *Dahl* v. *Nelson Donkin & Co.* (1861) 6 App. Cas. 38, 53, who said that frustration must be 'caused by something for which neither party was responsible.' Here it was owing to the choice of Y that the vessel remained unlicensed. Their Lordships, therefore, held that, even if performance had depended on the granting of a licence, Y's own default had caused frustration of the adventure.

This case appears to qualify the rule in *Baily* v. *De Crespigny* (1869) L. R. 4 Q. B. 180, in that, though a prohibitive statute may excuse performance of a contract, it will not do so where both parties had previous knowledge of the statute.

P. J. K.

CONTRACT—ILLEGALITY—PROMISE BY MARRIED MAN TO UNMARRIED WOMAN TO MARRY ON HIS OBTAINING A DECREE OF NULLITY—SEMBLE, AGREEMENT VOID AS CONTRARY TO PUBLIC POLICY—TORT—DECEIT—SEMBLE, NO ACTION BECAUSE PROMISEE A PARTY TO IMMORAL COHABITATION.

Siveyer v. *Allison.* [1935] 2 K. B. 403.

S. a single woman, met A. in 1926, and on account of representations made by the latter that he was a bachelor, the parties became engaged in October, 1927. In reliance upon the alleged promise and the above representations, S. permitted intimacy. In December, 1927, A. informed S. that he was married, but that he believed that his marriage had never been consummated owing to the physical condition of his wife. He stated that he could and would obtain a decree of nullity and that he would marry S. thereafter, in consequence of which the immoral association continued for several years.

The proposed matrimonial proceedings did not occur, and S. brought an action claiming damages (1) for breach of the agreements made in 1927, and (2) for the tort of deceit for A.'s representation in 1926 that he was a bachelor, and in 1927 that he could and would obtain a decree of nullity.

A. contended that the claims were statute-barred and, alternatively, that the promises were void as being contrary to public policy.

In entering judgment for defendant, Greaves-Lord J. held that although the action was statute-barred it would not have been maintainable upon other considerations. As to the claim on contract, he followed the opinion of Vaughan Williams L.J. in *Wilson* v. *Carnley* [1908] 1 K. B. 729, and held the promise void as being against public policy; and the claim for damages for deceit was negatived by the fact that the plaintiff was herself a party to the immoral association.

W. W. W.

CONTRACT—BREACH OF PROMISE—PROMISE TO MARRY PENDING DECREE NISI HELD VOID AS CONTRARY TO PUBLIC POLICY.

Fender v. *Mildmay.* [1935] 2 K. B. 334. [1936] 1 K. B. 111.

IN 1930 the plaintiff, a spinster, met the defendant, who was, to her knowledge, already married. After two years of ripening friendship, the defendant told the plaintiff that he would marry her if his wife divorced him, and as a result sexual intercourse took place. Shortly afterwards the defendant's wife instituted proceedings against him, and in January, 1933, she obtained a decree *nisi* for the dissolution of her marriage. In February and April, 1933, the defendant promised to marry the plaintiff when the decree became absolute. The marriage was finally dissolved in July, 1933, but the defendant refused to marry the plaintiff, and in 1934 married another woman, after which the plaintiff brought this action for breach of promise.

Hawke J. stated that the cases cited by the defence sufficed for decision in their favour. The law requires the observance of all the obligations of a marriage until that marriage is finally dissolved, and it will not look upon a decree *nisi* as an irrevocable election to terminate the marriage ties, nor as a licence for the pursuit of an immoral relationship. Divorce is not a mere matter of agreement between the parties. It is necessary to consider to the very end the position of children of the marriage owing to the possibility of reconciliation between the spouses. The learned judge refused to apply to this case (which was not a petition for divorce) the discretionary attitude adopted in the Divorce Court—a discretion which must depend upon the facts of the particular case. The promises were no less contrary to public policy as leading to the continuance of sexual relations which already existed than they would have been as tending to create those relations if not already established.

The Court of Appeal (*diss.* Greer L.J.) affirmed this decision. As the case will probably go to the House of Lords, a brief summary of their judgments is all that is needed. Both Slesser and Greene L.JJ. took much the same view as Hawke J. Greene L.J. added ([1936] 1 K. B. at p. 129) that such a contract is 'clearly one tending to lead to a breach of the rules of morality in that it tends to encourage or facilitate immorality which is none the less adultery by reason of the fact that a decree *nisi* has been obtained.' Public policy is notoriously a changeable thing (42 *Harvard Law Review*, 76—102) and this had been pressed in argument, but in the Court of Appeal the difference of opinion seemed to be not upon whether it had changed or not, but upon what exactly it is here and now. And the dissenting judgment of Greer L.J. seems preferable. In substance it was this. The doctrine of public policy must be applied with caution, but when a married man has ensnared a woman and by way of reparation he promises to marry her after the granting of a decree absolute, it is a lamentable thing that the reparation which he is almost bound in honour to make should be frustrated by the Courts. It is submitted with deference that nowadays a decree *nisi* is but a technical bond which fundamentally alters the relationship of the parties *inter se*. The decision of the majority appears to confer an unwarrantable sanctity on the institution of marriage.

W. W. W.

CONTRACT—MASTER AND SERVANT—IMPLIED OBLIGATION OF A SERVANT TO SERVE HIS MASTER WITH FIDELITY—SOLICITING CUSTOM FROM MASTER'S CUSTOMERS HELD TO BE A BREACH OF THIS OBLIGATION ALTHOUGH TRANSFER TO TAKE EFFECT ONLY AFTER TERMINATION OF EMPLOYMENT.

Wessex Dairies, Ltd. v. *Smith.* [1935] 2 K. B. 80.

THE plaintiffs, W. D. Ltd. were the proprietors of a dairy, and S., the defendant, was a roundsman in their service. At the time when the defendant entered the service of the dairy he had agreed with the then owner of it that in consideration of a weekly wage he would well and faithfully serve the owner, his assigns and successors, and would not during the continuance of, nor after quitting, the service interfere with the trade or the customers of the dairy. After some years had passed the defendant, wishing to set up business on his own account, gave notice to W. D. who were the successors of S.'s original employer. On the last day of his employment S., while engaged on his round, tried to persuade his employers' customers to transfer their custom to himself. W. D. alleged that this action of the defendant was a breach of the express contract to serve well and faithfully, or, alternatively, a breach of the implied obligation of a servant to serve his master faithfully.

In the Court of first instance, where the defendant was held liable to pay damages, it was conceded that the agreement between the plaintiffs and the defendant, in so far as it affected the defendant after he had quitted the service of the plaintiffs, was invalid on the ground of its being in restraint of trade.

In the Court of Appeal, however, the question of the validity of the express agreement was not discussed, for the Court did not base its decision on this agreement. Maugham L.J. (at p. 88) quoted with approval the following passage of a judgment of A. L. Smith L.J. in which the latter, dealing with contracts of service between master and servant, said: 'I think that it is a necessary implication which must be engrafted on such a contract that the servant undertakes to serve his master with good faith and fidelity' (*Robb* v. *Green* [1895] 2 Q. B. at p. 320). It was upon this implied obligation that the Court based its decision.

Reliance was placed by the defence on the case of *Nichol* v. *Martyn* (1799) 2 Esp. 732, in which Lord Kenyon C.J. is reported to have said: 'There is nothing morally bad, or very improper, in a servant, who has it in contemplation at a future period to set up for himself, to endeavour to conciliate the regard of his master's customers, and to recommend himself to them, so as to procure some business from them as well as others.' Now this statement seemed to cover the facts of the present case, and to justify the action of the defendant. But it was reported by Espinasse, whose work is described by Greer L.J. in his judgment (at p. 84) as 'that collection of imperfect and misleading reports,' and the Court of Appeal disapproved of *Nichol* v. *Martyn*, and accordingly dismissed the appeal.

J. S. A.

CONTRACT—OPTION TO EXTEND ON TERMS TO BE SUBSEQUENTLY AGREED HELD TOO VAGUE TO BE ENFORCEABLE—MUTUAL MISTAKE OF LAW DOES NOT VITIATE A CONTRACT.

British Homophone, Ltd. v. *Kunz and the Crystallate Gramophone, etc. Co., Ltd.* (1935) 152 L. T. 589.

On March 15, 1934, the plaintiffs made a written contract with the defendant K.—a pianist—who agreed to give the plaintiffs, the B. Co. an exclusive right to his services for the next twelve months. Clause No. I of the agreement stated that the agreement should be in force for a period of twelve months with an option on the part of the plaintiffs or K. to extend the same for a further period of twelve months on terms to be 'hereinafter [a mistake for "hereafter"] agreed'.

In accordance with the above clause, the plaintiffs, before the expiration of the old contract, renewed it for another year in substantially the same terms except that the inapt word 'hereinafter' was omitted. In doing so, both parties mistakenly thought that by the option in the old contract they were legally bound to renew that contract.

Before the new contract was discharged by performance or otherwise, K. entered into what he called a 'Provisional' agreement with the X Company.

When the plaintiffs heard of it, they brought an action against both K. and the X Co. for:—

(1) Damages for breach of contract.

(2) Injunction to restrain them from interfering with the contract between K. and the plaintiffs.

(3) A declaration that the plaintiffs were entitled to the exclusive services of K.

du Parcq J. held that the option in the old contract was not binding, that the plaintiff and K. made a mistake of law in thinking that it was when they entered into the new contract, but that that new contract was enforceable, although entered into 'in ignorance of their legal rights'. The main ground of the decision was that a mutual mistake of law does not vitiate a contract. As to the option, the learned judge pointed out that no other term except the duration of the new contract was settled —everything else was left to the imagination of the parties. Hence no implied terms could be read into the option.

Loftus v. *Roberts* (1908) 18 T. L. R. 532; *Hillas* v. *Arcos* (1932) 147 L. T. 503; *May & Butcher* v. *The King* [1934] 2 K. B. 17 and *Foley* v. *Classique Coaches, Ltd.* [1934] 2 K. B. 1 were cited with approval. The general principle underlying all these cases is that so long as some important term of the contract is left open for discussion by both parties, there is no contract unless there is some definite way of deciding the terms.

The defendant company were held not liable as they had not interfered with the contract between K and the plaintiffs, for they did not know when K.'s contract with the plaintiffs would terminate or that it contained any option clause, and when they knew they disclaimed any desire to demand any service from K.

M. L.

CONTRACT—SALE OF GOODS ACT, 1893, S. 4—COMMISSION TO PAINT PORTRAIT IS CONTRACT FOR WORK AND LABOUR.

Robinson v. *Graves.* [1935] 1 K. B. 579.

THIS was an appeal from a decision by Acton J. G. the defendant had orally commissioned R. the plaintiff, an artist, to paint the portrait of a lady, and promised to pay him 250 guineas for it. R. commenced to paint the picture, the lady giving him a sitting for the purpose. G. then wholly repudiated the contract. When sued for the purchase money, he relied on s. 4 Sale of Goods Act, 1893, which requires (*inter alia*) a written memorandum of any contract for the sale of goods of the value of £10 and upwards. R. contended that this was a contract for work and labour, which the S. G. A. would not touch. Acton J. felt himself bound by the decision in *Lee* v. *Griffin* (1861) 1 B. & S. 272 to hold that this was a contract for the sale of goods, and gave judgment for G.

The Court of Appeal reversed this decision. They quoted with approval the *dicta* of Pollock C.B. and Martin B. in *Clay* v. *Yates* (1856) 1 H. & N. 73 where it was held that a contract that a printer should print a book from a manuscript was a contract for work and labour which did not come within the Statute of Frauds (since embodied in the Sale of Goods Act, 1893) and hence did not require a written memorandum for enforcement. In this case Pollock C.B. remarked (at p. 78), 'Where the application of skill and labour is of the highest description, and the material is of no importance as compared with the labour, the price may be recovered as labour, work and materials'. Martin B. also said in the course of argument 'Suppose an artist paints a portrait worth 300 guineas and supplies canvas for it which is worth 10s., surely he might recover under a count for work and labour'. The case of *Lee* v. *Griffin* was really an authority for the plaintiff, for it recognised the validity of *Clay* v. *Yates*. The Court doubted the *dictum* of Blackburn J. (by which Acton J. held himself bound), 'I do not think that the relative value of the labour and of the materials upon which it is bestowed can in any case be the test of what is the cause of action'. Though this had been followed both in *R.* v. *Wood Green Profiteering Committee* [1920] 89 L. J. K. B. 55 and in text books, the Court held it to be too wide. Greer L.J. in his judgment said that on the natural meaning of the English language, a commission to paint a picture was an undertaking by an artist to exercise such skill as he possessed to produce for reward a thing which would ultimately have to be accepted by the client, which is a contract for work and labour. Slesser L.J. further pointed out that an additional argument in favour of the plaintiff was that under the Copyright Act of 1911 the copyright in a portrait vests in the person by whom it is ordered. His decision was, however, given only on the facts, as he could imagine cases where portraits are ordered in circumstances which make the contract one for the sale of goods. Here, particularly as the lady had to contribute something to the contract in the form of sittings, it was impossible to regard it as a contract for the sale of goods.

The Court pointed out that this decision was not necessarily contrary to that in *Isaacs* v. *Hardy* (1884) 1 Cab. & E. 287 where a contract between a picture dealer, whose sole object was to acquire something he might sell in his business, and an artist was held to be a contract for the sale of goods.

The test would now appear to be that if skill and labour have to be exercised for the production of the article and it is only ancillary that there will pass from artist to client some materials in addition to the artist's skill, there is a contract for work and labour.

J. E.

CRIMINAL LAW—MENS REA—KILLING A HOUSE PIGEON—'UNLAWFULLY AND WILFULLY KILL'—LARCENY ACT, 1861, s. 23—HONEST BELIEF THAT BIRD WAS A WILD PIGEON—APPREHENSION OF DAMAGE TO CROPS—NEITHER OF THESE HELD TO BE A DEFENCE.

Cotterill v. *Penn.* [1936] 1 K. B. 53.

THIS was a case stated on an information under the Larceny Act, 1861, s. 23: 'Whosoever shall unlawfully and wilfully kill, wound or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law shall, on conviction' be liable to a penalty. Penn when in his garden for the purpose of shooting wild pigeons which had damaged his crops, shot a homing pigeon, released in a road near by, honestly believing it to be a wood pigeon. He saw the bird for five yards only; this with the dazzling sun prevented him from distinguishing between a wood pigeon and a homing pigeon whilst delay would probably have meant loss of his shot. The justices acquitted him on the grounds that (1) he had no guilty mind; (2) he was honestly mistaken in believing the bird to be wild and to be about to attack his crops. On appeal, the justices were held to be wrong on both points and were directed to convict.

The Court held (1) that felonious intent was not necessary under s. 23; (2) that an honest belief that the bird was wild, and a reasonable apprehension of danger to crops were not defences under this section. Lord Hewart C.J., (at p. 61), said 'In my opinion, although the section says "unlawfully and wilfully" it does not require the element of *mens rea* beyond the point that the facts must show an intention on the part of the person accused to do the act forbidden, which was here that of shooting. It seems to me to be immaterial that the bird which the respondent shot was of a different kind from that which he thought that he was shooting. If the section had used the word "maliciously" the state of mind of the person charged would have been relevant. But using the terms "unlawfully and wilfully" the section seems to me only to mean that the person accused intended to shoot and that the shooting was without a lawful excuse'. The second defence he dismissed saying, 'It seems to me to be an undue straining of the authorities to say that an apprehension of danger which may or may not turn out to be real is a lawful excuse' (p. 61). *Horton* v. *Gwynne* [1921] 2 K. B. 661 was held to cover the case.

The cases of *Taylor* v. *Newman* (1863) 4 B. & S. 89 and *Farey* v. *Welch* [1929] 1 K. B. 388 were distinguished by Avory J. from the present case. The former differed, because the defendant actually acted in defence of his property or else 'the Court would have held that the mere act of killing a house pigeon was an offence if the defendant had killed the bird at which he was shooting' (p. 63). The second case was a decision on 'take', not 'kill', and further Avory J. said: 'I think that the real ground of decision there was that there had been no taking of the pigeon'

(p. 64). Humphreys J. agreed though he had difficulty in reconciling *Horton* v. *Gwynne* with *Farey* v. *Welch*.

The case illustrates that in recent statutory offences, where a qualifying word such as 'maliciously' is not used, the degree of *mens rea* required is much less than in common law, or in older or more important statutory offences such as *R.* v. *Tolson* (1889) 23 Q. B. D. 168. An intention to do the actual act forbidden (here the shooting) is conclusive presumption of the *mens rea* required. This tendency occurs mainly in statutes of peculiarly public concern and is illustrated by the cases of *Cundy* v. *Le Cocq* (1884) 13 Q. B. D. 207 and *Hobbs* v. *Winchester Corporation* [1910] 2 K. B. 471. As the actual commission of the forbidden act, unless intrinsically accidental, appears to be the sole requirement it may be submitted that in such circumstances the maxim 'actus non facit reum nisi mens sit rea' needs very considerable qualification.

Dr. Stallybrass in 'The Eclipse of *Mens Rea*' 52 L. Q. R. (1936), 60—67, criticizes the attempt of the Court in *Cotterill's Case* to reconcile *Horton* v. *Gwynne* with *Farey* v. *Welch*, and also notes current judicial tendencies to eliminate *mens rea* in statutory offences of this sort. It is difficult to see what answer is possible to the points made by the learned author.

W. W.

[See also the articles by Mr. J. W. C. Turner and Mr. R. M. Jackson, *ante*, pp. 31—66, 83—92.—Ed.]

Criminal Law — Murder — Defence of Accident — Presumption of Innocence — Burden of Proof — Reasonable Doubt — Proper Direction to Jury.

Woolmington v. *Director of Public Prosecutions.*
[1935] A. C. 462; 25 Cr. App. R. 72.

W. set up the defence of accident to a charge of murder. Swift J., in directing the jury, told them that if the Crown satisfied them that the deceased died at the prisoner's hands, then he had to show that there were circumstances to be found from the evidence which had been given from the witness-box which would alleviate the crime so that it was only manslaughter, or which would excuse the homicide altogether, by showing that it was pure accident.

The prisoner was convicted and appealed to the Court of Criminal Appeal on grounds of misdirection to the jury. The Court upheld the conviction, whereon the prisoner appealed to the House of Lords under a *fiat* given by the Attorney-General. They held that the judge had misdirected the jury as to the burden of proof, and they quashed the conviction. Viscount Sankey L.C., in a speech in which the other noble and learned Lords concurred, said that the presumption of innocence, in English law, is very strong. If, at any period, the judge could rule that the prosecution had established its case, and that the onus was shifted on to the prisoner to prove that he was not guilty, this would enable the judge to say that a jury must, in law, find a prisoner guilty. Thus the judge, and not the jury, would decide the case—and this would

be contrary to all principles of Common Law. It is a distinguishing characteristic of the English law that it is the duty of the prosecution to prove the prisoner's guilt except in the case of insanity and various extraordinary statutory exceptions. Moreover, if at the end of the case there is a reasonable doubt created by evidence given either by the prisoner or the prosecution as to whether or not the killing was done with malicious intention, then the prosecution has not made out its case and the prisoner is entitled to an acquittal. This rule is always applicable, no matter what the charge. In murder the Crown must prove (a) death as the result of a voluntary act of the accused, and (b) malice of the accused. Malice may be proved either (i) expressly, or (ii) by implication where death occurs as the result of a voluntary act of the accused which is intentional and unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown, that the act, on his part, which caused the death was either unintentional or provoked. If the jury are either satisfied by the explanation or are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to an acquittal. In so far as the proposition laid down by Sir Michael Foster in his 'Crown Law' (1762), p. 255, and the summing-up of Tindal C.J. in *R.* v. *Greenacre* (1837) 8 C. & P. 35, departed from these principles, those authorities are wrong. Foster's proposition was this: 'In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth.' This statement, which was incorporated in all the later leading books on criminal law, was regarded by the House of Lords as really unsupported by authority if it ran counter to the principles stated above.

D. E. G.

CRIMINAL LAW—PUBLIC MEETING—REASONABLE APPREHENSION BY POLICE OF BREACH OF PEACE—PREVENTION OF MEETING.

Duncan v. *Jones.* (1935) 52 T. L. R. 26.

THIS was an appeal against the decision of the County of London Quarter Sessions affirming a conviction on the charge of obstructing the police in the execution of their duty.

D., the appellant, and others were advertised to give an address on 'Sedition' at a public meeting on July 30, 1934; the meeting was held near the entrance to an unemployed training centre. A box was placed in the roadway opposite the entrance to the training centre. D. mounted the box to speak; on being told by the police that she could not speak there, she persisted in her attempt to do so; in consequence she was arrested and taken into custody. The police alleged no interference either by D. or by the other persons present save in the sense of the obstruction (to traffic) caused by the box. It was owing to a disturbance at an earlier meeting conducted by D. that the police apprehended that a breach of

the peace would take place if they allowed the meeting in question to be held. D. was convicted of obstructing the constable in the execution of his duty. The Divisional Court upheld the conviction. The Lord Chief Justice, in giving judgment, said that it had been suggested that the so-called right of public meeting was in issue. English law, however, did not recognize any special right of public meeting, either for political or other purposes. 'The right of assembly, as Professor Dicey puts it, . . . is nothing more than a view taken by the Court of the individual liberty of the subject.' In his Lordship's opinion this case did not even touch that important question, for *Beatty* v. *Gillbanks* (1882) 9 Q. B. D. 308, which had been cited in argument, dealt with the question of breach of the peace caused by persons other than the appellants and was therefore irrelevant to the present case. He regarded as more useful the observation of Bramwell B. in *R.* v. *Prebble* (1858) 1 F. & F. 325, where in holding that a police constable had no right to remove persons from a certain inn he remarked 'It would have been otherwise had there been a nuisance or disturbance of the public peace, or any danger of a breach of the peace'. In the present case there was clearly a causal connexion between the earlier meeting and the disturbance which occurred after it.

Humphreys J. agreed, pointing out that not only was the question of unlawful assembly not in issue but that no charge of that sort was even suggested against D. It was the duty of a police officer to prevent apprehended breaches of the peace. Here he had reasonably apprehended a breach of the peace, had taken steps to prevent it, and while doing so had been wilfully obstructed by the appellant.

G. N. F.

CRIMINAL TRIALS — IRREGULARITIES — CHARACTER OF ACCUSED — CROSS-EXAMINATION — EVIDENCE — DUTY OF COUNSEL FOR PROSECUTION — INSUFFICIENT SUMMING-UP.

R. v. *Wadey.* (1935) 25 Cr. App. R. 104.
R. v. *Sugarman.* (1935) 25 Cr. App. R. 109.
R. v. *Peckham.* (1935) 25 Cr. App. R. 125.
R. v. *Currell.* (1935) 25 Cr. App. R. 116.
R. v. *Smith Sr. and Smith Jr.* (1935) 25 Cr. App. R. 119.

A SPATE of appeals concerning irregularities which, judging by report, appear to be far too common in recent criminal trials. All six convictions were quashed.

In each of the first two cases the accused had put his character in evidence. Wadey was asked in cross-examination questions about previous accusations, all of which had either been dismissed or had not been proceeded upon. 'It was a deplorable trial', said the Court; one irregularity followed another. Sugarman was charged with receiving. Under section 43 of the Larceny Act, 1916, evidence could have been given of property recently stolen other than that named in the indictment having been found in his possession. Counsel for the prosecution jumped to the inference that, as other stolen property was not found in his possession, it might nevertheless be suggested to the jury that he had received other stolen property; and proceeded to cross-examine him as to the origin of a sum

of money found upon him, suggesting that it was the proceeds of the sale of other stolen property, concerning the receipt of which the prosecution had no evidence.

In *R.* v. *Peckham*, there were two indictments, larceny and receiving. He pleaded not guilty to both. Only the charge of receiving was taken. Apparently no one in the Court, Deputy Chairman, Clerk of the Peace, three counsel for the Crown, or counsel for the defence, knew with what the appellant was really charged; and the case was proceeded with on that footing for some time. Counsel for the Crown had not looked at the indictments. Evidence only relevant to the charge of stealing was admitted on the charge of receiving. On top of that, a witness for the prosecution was asked in cross-examination whether he had been into the prisoner's house, and replied that he had been in the prisoner's house while he was away in prison (on another occasion). Counsel for the prisoner objected, and asked that the trial be begun again before a fresh jury, but his application was refused.

In all three cases, the Court commented on the duty of the counsel for the prosecution, and the admission of evidence; and the comment may be summarized as follows:—

(1) Counsel entrusted with the public task of prosecuting accused persons should realize that one of their primary duties is to be absolutely fair. The business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done. A counsel should stand on the real strength of his case, and not try to strengthen and support it by things collateral in a manner contrary to the letter and spirit of English law. As was pointed out by Lord Sankey in *Maxwell* v. *D. P. P.* (1934) 24 Cr. App. R. 152, 176: 'It must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed.'

(2) Counsel for the prosecution should always before opening acquaint themselves with the contents of the indictment by seeing either the actual indictment or a copy thereof.

(3) Where a statement injurious to the prisoner with regard to his previous record is made to the jury, and counsel for the defence applies for the trial to be started afresh, the Court should begin the trial afresh before another jury.

In *R. v. Currell*, where there were charges on two counts of stealing or receiving, the Chairman, in summing-up used the word 'take' in an ambiguous way, in the sense of 'take from another' as in larceny, and in the sense of 'receive' in receiving. He also failed to point out to the jury that in the crime of receiving guilty knowledge must be proved. The Court held that the report of *R.* v. *Newman* (1913) 9 Cr. App. R. 134 (where it was held that in a case of receiving no summing-up at all might suffice) was insufficient, and held that Lord Reading's judgment in *R.* v. *Schama and Abramovitch* (1914) 11 Cr. App. R. 45 is a correct statement of the law: 'It is essential in cases of this character that there should be a careful and proper direction.'

In the case against the two Smiths, for receiving, practically the whole of certain stolen property was found in a shed occupied by them. Smith Sr. told the police: 'My boy will tell you all about it.' There was a conflict of evidence as to Smith Jr.'s explanation to the police. He said that he told them that two men had brought the property to the shed, and he had let part of the shed to them for storage. The police gave a different description of the interview. At the police court, both prisoners were represented, and neither of them made any statement. The Chairman, in summing up, adopted the police evidence as to the interview with Smith Jr. instead of leaving it to the jury, as he ought to have done. He made a very great deal of the fact that the accused had said nothing at the police court, emphasizing that they had a perfect defence if the tale Smith Jr. said that he had told the police was true. There was no direction to the jury that the father could only be guilty of receiving if it were proved that he adopted his son's receipt knowing that the goods had been stolen. The Court of Criminal Appeal found:—

(1) That the most that the evidence showed was that the son allowed goods to be put into the shed; there was no proof that the father had ever seen them.

(2) That in cases of this kind there must be a most careful summing-up as to the ingredients of the crime of receiving.

(3) That the conflict of evidence as to the son's statement to the police regarding how he received the goods ought to have been left to the jury.

(4) That no comment should have been made on the fact that the prisoners said nothing at the police court; they had a right to say nothing.

H. B.

Intestacy—Public Policy—Murderer Disqualified from Benefiting under Victim's Intestacy—Administration of Estates Act, 1925, s. 46.

Re Sigsworth; Bedford v. *Bedford.* [1935] 1 Ch. 89.

Mrs. Sigsworth left all her property to her son Bedford Sigsworth. At the inquests on their death the verdicts were that Bedford had murdered his mother and feloniously killed himself. It was not disputed that Bedford could not benefit under her will owing to the long-established rule of public policy that a sane murderer cannot benefit under the will of his victim. This being so, Mrs. Sigsworth was deemed to have died intestate and her property would pass according to the Administration of Estates Act, 1925, s. 46, which in fact meant that it would pass to Bedford, apart from the question of his having murdered the intestate. Was the above rule to be extended to prevent a sane murderer from benefiting by his victim's intestacy? Clauson J. held that it was.

He said (at p. 92), 'in my judgment the principle of public policy which precludes a [sane] murderer from claiming a benefit conferred on him by his victim's will precludes him from claiming a benefit conferred on him, in case of his victim's intestacy, by statute', and he quoted Fry L.J. in *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q. B. 147, 157, who said that the principle 'must be so far regarded

in the construction of Acts of Parliament that general words which might include cases obnoxious to this principle must be read and construed as subject to it'. So too Farwell J. in *Re Pitts* [1931] 1 Ch. 546, 550.

Clauson J. disapproved of the views expressed in *Re Houghton* [1915] 2 Ch. 173, 177, where Joyce J. held that a rule of public policy cannot override a statute, in support of which view he cited the American case of *Carpenter's Estate,* 50 Am. St. Rep. 765. The property must pass as directed in the statute even if it does go to a murderer. But here the murderer was insane, so Joyce J.'s remarks are *obiter dicta,* for the murderer did benefit on other principles.

In *Cleaver's Case* a wife murdered her husband who had an insurance policy under which she would receive £2,000 at his death. Under the Married Women's Property Act, 1882, s. 11, such a policy would have created a trust in favour of the wife. When all trusts are performed or unperformable there results a trust in favour of the husband. Fry L.J. in the words quoted above held that the rule of public policy created an exception to the Act, so the trust was treated as unperformable.

In *Re Pitts* it was argued that the plaintiff sought to add to the Administration of Estates Act, s. 46, the words 'subject to public policy'. Farwell J. was of opinion *obiter* that a sane murderer could not claim under his victim's intestacy. 'I should have thought', he said, 'that the views of Fry L.J. in *Cleaver's Case* would prevail and the provisions of the Administration of Estates Act, 1925, s. 46, however peremptory, would be read and construed subject to the public policy rule' (at p. 550).

The rule of public policy here laid down is part of the old general rule that a criminal shall not be able to take advantage of rights that may accrue to him as a result of his crime. One of the earliest cases on this was *Amicable Assurance Society* v. *Bolland,* 4 Bli. (N.S.) 194, otherwise known as 'Fauntleroy's Case'. In that case assignees of a forger were not allowed to benefit by an insurance policy on his death at the hands of justice by reason of his forgery. In *Sigsworth's Case* the application of the rule to wills is logically and reasonably extended to cover intestacy; an extension fully in accord with the aim of public policy, which is to remove a probable and tempting inducement to crime and to prevent such a criminal or his representatives obtaining legal benefits by his crime.

As Sir Samuel Evans P. said in *In the Estate of Crippen* [1911] P. 108, 112: 'The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence.'

W. D. C.

REAL PROPERTY—SETTLEMENT—APPOINTMENT—REAL ESTATE—EQUITABLE ESTATE—ABSENCE OF WORDS OF LIMITATION—INTENTION OF APPOINTOR—LIMITATION TO A PERSON 'ABSOLUTELY' HELD TO CONVEY THE FEE SIMPLE—DEED TAKING EFFECT PRIOR TO 1926—LAW OF PROPERTY ACT, 1925, s. 60.

Re Arden; Short v. *Camm.* [1925] 1 Ch. 326.

IN exercise of a special power of appointment given to her by the will of her father who died in 1894, a married daughter of the testator, by

deed poll dated October 12, 1896, appointed that a one-third share of certain freehold hereditaments and of the investments for the time being representing the same should be held in trust for her married daughter N., her heirs, executors, administrators and assigns absolutely. Later in exercise of the same power, by deed poll dated January 19, 1901, expressed to be supplemental to the will and the two former deeds, and reciting her intention to appoint the residue of the trust property, Mrs. Camm appointed that the trustees of the will of the testator should stand possessed of the residue then remaining unappointed of the said property in trust, as to one-fourth share thereof for N. and as to three-fourth shares thereof for her son, Cuthbert, absolutely.

The question before the Court was whether upon the true construction of the deed of appointment dated January 19, 1901, and in the events which happened, the appointments made under that deed in favour of the two appointees of shares in the property settled by the will of the testator carried the fee simple or other absolute interest therein or life interests only in such shares.

Clauson J. held that they conveyed the fee simple. He said that the word 'absolutely' applied to both the appointments under that deed, and that, having regard to the recital in that deed, and the word 'absolutely', the appointor's intention to pass the whole fee simple was clearly shown. As to the absence of words of limitation, his Lordship held he was bound by *Re Bostock's Settlement* [1921] 2 Ch. 469. The principle laid down in *Bostock's Case* was that in equitable limitations by trust executed, if strict conveyancing language is used, the deed must be construed strictly; if, however, strict conveyancing language is not used, then it is sufficient that the deed discloses a clear intention as to the quantum of interest which is intended to pass. His Lordship held, therefore, that as 'absolutely' was not a strict conveyancing word, the clause must be read as a whole, and that the deed passed the fee simple. He added that owing to the view he took, it was not necessary to decide whether the strict rules governing a deed creating an equitable estate by its own force applied to one which merely operates by way of appointment to delimit interests created by an antecedent will. He further added that the Law of Property Act, 1925, s. 60, did not apply. Section 60 enacts that a deed taking effect after December 31, 1925, shall operate to pass the whole fee simple or other interest of the grantor unless a contrary intention appears. As this section applies only to deeds after 1925, obviously it could not apply here.

H. J. G.

TORT—DAMAGES—SALE OF SHIP INJURED BY TORT DOES NOT PRIMA FACIE AFFECT OWNER'S RIGHT TO RECOVER COST OF REPAIRING INJURY.

The London Corporation. [1935] P. 70.

THIS was an appeal from a decision of Bateson J. whereby the owners of a ship had been awarded damages for injuries sustained by their ship owing to the negligence of X. The negligence was admitted and the amount of damage had been agreed at £250. Before the damages were assessed the ship was sold for breaking-up purposes to a foreign company. Bateson J. held that the owners of the ship were entitled to

recover as damages the estimated cost of repairs. X appealed on the ground that the sale value of the ship had not been affected by the damage from his negligence, because owing to her age she could have been sold only for breaking up and not for use.

The judgment of the Court dismissing the appeal was delivered by Greer L.J. who said that *prima facie*, the damage occasioned to a vessel is the cost of repairs unless the estimate is proved to be incorrect and the value of the vessel to be undiminished after such injury; and the burden of proving that no damage had been suffered was upon X and was not discharged by the mere assertion that what happened to her subsequently was inevitable and would have occurred had the vessel not been damaged at all; for *non constat* that the ship would have been sold for breaking up if she had not been injured. Further the learned Lord Justice pointed out that the bargaining position of the vendor of an injured vessel is weakened as a consequence of the injury.

Apart from this, the Court held that *prima facie*, the damage was the cost of repair and the fact that the vessel had been sold for breaking up was an accidental circumstance which should be ignored with regard to the diminution of damages. This point was made abundantly clear by Sir James Hannen in *The Endeavour* (1890) 6 Asp. M. L. C. 511: 'If somebody out of kindness were to repair the injury and make no charge for it, the wrongdoer would not be entitled to refuse to pay as part of the damages the cost of the repairs to the owner'. It is submitted that this must be taken subject to the right of the wrongdoer to prove that the value of the vessel was not diminished.

It is suggested that the importance of this case lies in the fact that where a wrongdoer contends that an injury done by him to the property of another does not result in loss, the onus of proof rests upon him, and that this is only an application of a fundamental principle of English law, 'Ei qui affirmat, non ei qui negat, incumbit probatio'.

D. J. H.

TORT—NEGLIGENCE—ANIMALS MANSUETAE NATURAE—PONY INSECURELY TETHERED IN STABLE—OWNER HELD LIABLE FOR DAMAGE TO PERSON DONE BY ITS ESCAPE TO HIGHWAY.

Deen v. *Davies.* [1935] 2 K. B. 282.

A PONY insecurely tied by the defendant in an open stable in a large town had an attack of nostalgia, broke away from its moorings, and started to trot homewards. In attempting to get out of its way the plaintiff, an old woman on crutches who was then preoccupied in trying to step down from the kerb, fell down and was severely injured. In the County Court £150 damages were awarded to the plaintiff. The Court of Appeal affirmed this decision.

It briefly upheld the following findings of the County Court judge: that the pony did not 'exhibit any savage propensities' but behaved itself like a normal unattended pony; that but for the defendant's careless tethering the damage would not have occurred; and that the damage was not too remote for an action to lie. The Court then discussed whether on these facts the defendant was liable in negligence.

The following Common Law rules were distinguished: (1) that a man who has brought a horse or other animal on to the highway has a duty to take care, *e.g. Haynes* v. *Harwood* [1935] 1 K. B. 146, 153; and this case may include a duty not to leave a horse unattended; (2) the rule, accepted as law in *Jones* v. *Lee* (1911) 106 L. T. 123, *Cox* v. *Burbidge* (1863) 13 C. B. (N.S.) 430, and other cases, that there is no obligation on the part of an owner or occupier of land to keep his animals *mansuetae naturae*, from straying on to the highway unless they are known to be vicious. The real case in point appears to be *Heath's Garage* v. *Hodges* [1916] 2 K. B. 370, where judgment was given in favour of the owner of sheep which had strayed on to the highway and damaged a car. As the owner of the sheep, in that case, was held to owe no civil duty to the public to keep them fenced off the road, there could be no tortious liability.

Slesser L.J., relying on a *dictum* of Lord Atkin in *Fardon* v. *Harcourt-Rivington* (1932) 146 L. T. 391, 392, rested his decision on the existence of a 'particular duty in particular circumstances' to take care, but he does not satisfactorily deal with the difficulty caused by the rule in *Heath's Garage* v. *Hodges* (*supra*), where (except for Cozens-Hardy M.R.'s judgment, at p. 376), it seems that the Court of Appeal doubted whether there was *any* such duty at all. Romer L.J., however, while pointing out the illogicality of a rule which would permit a man with impunity to tether his horse carelessly in an open stable near the highway while he is liable for tethering it carelessly in the street, attempted to find a historical justification for his decision; though he agreed with Slesser L.J. that the case could be decided on its particular facts. He suggests (p. 296), with Neville J. in *Heath's Garage* v. *Hodges* (*supra*) as his authority, that 'in days long before country roads existed it was the habit of our ancestors to depasture their cattle all over the place, and when the road was subsequently dedicated to the public by the owner of the land, the dedication was made subject to this well-known habit'. And, he adds, if that was so, it would be difficult to imagine that highways in a town were dedicated subject to any right of the public to let their domestic animals roam over the road between the houses of the town.

Is there then a different law, regarding animals, for town and country? If Romer L.J. has correctly expounded the law this would appear to be so. Difficult cases may arise in the future depending on the exact line of demarcation between town and country. And as the rule in the country has long outlived its original usefulness it is suggested a general duty, similar to that now applying in towns, should be imposed. Indeed, under the Highway Acts of last century it is a criminal offence to allow fences bordering the highway to fall into disrepair.

R. H. H.

TORT—NEGLIGENCE—DEATH OF INJURED PERSON—PAIN AND SUFFERING—LOSS OF EXPECTATION OF LIFE.

Slater v. *Spreag.* [1936] 1 K. B. 83.

A COLLIDED with a car driven by B, and died two days later, never having recovered consciousness in the interval between the accident and

his death. The accident was admittedly due to negligence on the part of B. A's widow sued under the Fatal Accidents Act, 1846, and also, as A's administratrix, under the Law Reform (Miscellaneous Provisions) Act, 1934. Claims under the latter head were made for the pain and suffering of the deceased, for loss of expectation of life and for loss of earning capacity.

The Act provides (section 1) that causes of action vested in a person before death shall survive him for the benefit of his estate.

The plaintiff had an obvious and undisputed claim under the Fatal Accidents Act; her claim in respect of loss of earning capacity was clearly excluded by section 2 of the Law Reform Act. As regards the other claims, MacKinnon J. held that while it was quite conceivable that in an accident case of this nature a cause of action might vest in the injured party and consequently, under the new Act, accrue for the benefit of his estate after his death, in this case such a result was impossible as no cause of action had ever existed; the deceased had never been conscious after the accident and had therefore had no pain or suffering. He further held that no damages for loss of expectation of life were recoverable. In *Flint* v. *Lovell* [1935] 1 K. B. 354 it had been held that such loss of expectation gave rise to a cause of action: but only, in his opinion, for loss of expectation considered from the point of view of its subjective effect on the injured person, for mental suffering undergone by the plaintiff as a result of having his prospect of life reduced. As the deceased had never been conscious after the accident no cause of action had vested in him.

The decision in respect of the claim for pain and suffering is obviously reasonable and it has been followed in *Rose* v. *Ford* (*q.v. infra*). But the learned judge was apparently under a misconception as to the precise effect of *Flint* v. *Lovell*. The basis of liability for loss of expectation of life is not the mental suffering of the injured person (*v. infra*, in *Rose* v. *Ford*).

E. C. R.

Tort—Negligence—Death of Injured Person—Action by Administrator of Deceased's Estate—Pain and Suffering—Loss of Expectation of Life—Law Reform (Miscellaneous Provisions) Act, 1934.

Rose v. *Ford.* [1936] 1 K. B. 90.

Miss R. was seriously injured in an accident caused by the negligence of F. Her leg was fractured, gangrene set in on amputation, and she died four days after the accident, having been unconscious for most of the intervening period.

Her father brought an action under the Fatal Accidents Act, 1846, and also, as her administrator, under the Law Reform (Miscellaneous Provisions) Act of 1934. Under the latter head were included claims (a) for pain and suffering for which the deceased could have recovered had she lived; (b) for damages for the loss of the deceased's leg; (c) for loss of expectation of life.

At the Assizes, Humphreys J. held that nominal damages only could

be awarded for pain and suffering, as the deceased had been conscious only for short intervals after the accident; that the loss of her leg gave rise to a claim for damages the amount of which could not be affected by the fact that she had died a short time afterwards; and, finally, that no damages were recoverable in respect of the deceased's loss of expectation of life, because *Flint* v. *Lovell* [1935] 1 K. B. 354 decided that such damages were recoverable only for the mental suffering occasioned by such loss, and the deceased was never in a condition to experience such mental suffering.

The defendant appealed from the findings of the learned judge concerning the claims for deceased's pain and suffering and for loss of her leg; the plaintiff cross-appealed against the finding that no damages were recoverable in respect of loss of expectation of life.

The Court of Appeal held that damages for pain and suffering must be purely nominal for the reason given by the learned judge. Moreover, damages in respect of the loss of the deceased's leg must also be nominal; regard must be paid to the fact that she lost the use of it for only two days.

Greer L.J. in dealing with the cross-appeal held that the opinions of Humphreys J. and of MacKinnon J. in *Slater* v. *Spreag* (*q.v. supra*) as to the effect of *Flint* v. *Lovell* were misconceived. Damages in that case were not awarded for the mental suffering which the loss of expectation of life had occasioned to the injured person: the plaintiff succeeded because of the mere fact that as a result of the accident it was certain or highly probable that his life would be shortened by ten years or so. In this conclusion Slesser and Greene L.JJ. concurred. The majority of the Court held further, that claims under the rule in *Flint* v. *Lovell* were to be restricted to cases where the injured person had not subsequently died. It had been laid down in *Baker* v. *Bolton* (1808) 1 Camp. 493 and *Admiralty Commissioners* v. *S.S. Amerika* [1917] A. C. 38 that the death of a human being could not be complained of as a civil wrong; if a claim for loss of expectation of life were to be allowed to accrue for the benefit of the estate of a deceased person, this rule would be, substantially, infringed, and there was nothing in the Law Reform Act which would warrant the overruling of *Baker* v. *Bolton*.

The reply to the numerous criticisms of this decision seems to be that the Court was construing the Act of 1934 and, as Greene L.J. was careful to point out, that Act creates no new cause of action. 'It would not be correct to say' he continues (at p. 111) 'that Miss Rose at the moment of her death had any cause of action vested in her under which she could claim damages for her own death, and her administrator can be in no better position.' The rule laid down in *Flint* v. *Lovell* was expressly limited to cases in which the person who suffered loss of expectation of life was actually living and was the plaintiff in the action. It is difficult to see what other conclusion consistent with the rule in *Baker* v. *Bolton* could possibly have been reached by the Court.

E. C. R.

TORT — NEGLIGENCE — DUTY OF MANUFACTURER OF GOODS TO ULTIMATE CONSUMER—CONTRACT—BREACH OF IMPLIED WARRANTY OF QUALITY BY RETAILER OF GOODS.

Grant v. *Australian Knitting Mills, Ltd. and others.* [1936] A. C. 85.

G., A DOCTOR in South Australia, bought some underwear from M. & Co., retailers, who had purchased it from the Australian Knitting Mills, Ltd. (hereafter called 'the Mills'), the manufacturers. Owing to negligence on the part of the Mills, there was an excess of chemicals in the underwear which gave G. dermatitis. G. sued (i) M. & Co. for breach of implied warranty of quality in the goods sold; and (ii) the Mills for the tort of negligence for breach of their duty towards an ultimate user of their goods.

Murray C.J. in the Supreme Court of South Australia gave judgment against both respondents. This was reversed by the High Court of Australia. And this was a further appeal to the Judicial Committee of the Privy Council.

M. & Co. were held liable in contract for breach of implied warranty or condition under exceptions (i) and (ii) of section 14 of the South Australia Sale of Goods Act, 1895 (identical with section 14 of the English Sale of Goods Act, 1893). Exception (i) refers to reasonable fitness of the goods for the purpose for which they are sold, and exception (ii) to the condition that they shall be of merchantable quality.

As regards the liability of the manufacturers it was contended that the facts in the present case fell outside the decision of the House of Lords in *Donoghue* v. *Stevenson* [1932] A. C. 562 (see also *Cambridge Law Journal* (1933), pp. 116—117), and consequently could give rise to no liability in tort; *i.e.* the only legal relationships in the matter were those under the two contracts between the respective parties to these contracts, the one between the manufacturers and the retailers, and the other between the retailers and the appellant; it was urged that no duty existed between the manufacturers and the appellant. Their Lordships held that the principles summed up in *Donoghue's Case* in the words of Lord Atkin applied, and (at pp. 102—103) quoted his words with approval: 'A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life and property, owes a duty to the consumer to take that reasonable care.' Consequently their Lordships decided in G.'s favour, holding that the manufacturers of the underclothing were liable for their lack of care in the manufacture.

This case clearly shows that *Donoghue's Case* is not confined to food and drink to be consumed internally, as the underwear was worn externally. Again, in *Donoghue's Case* the defective article was in an opaque bottle, stoppered and sealed, and so to a certain extent the manufacturers had retained control. It was contended that here the garments could be tampered with, and that this possibility was enough to distinguish the two cases. Their Lordships refused to accept this contention, and pointed out that the essential point of the decision in *Donoghue's Case* was that the article of manufacture should reach the consumer subject to the same defect as it had when it left the manufacturer.

Their Lordships, it is clear, realized the danger in this type of case that a manufacturer's liability might be indefinitely extended, so that he might be sued for a defect causing damage, perhaps years later. It was pointed out that in such a case the question of remoteness of damage would be an important factor. No doubt many difficult cases will come before the Courts before the precise limits of the principle are defined, but it is submitted that some such principle is an essential of human existence in a mechanical age where the public are constantly trusting their person and property to the care of some manufacturer.

A. Ll. A.

TORT—NEGLIGENCE—HOSPITAL DOCTORS AND NURSES—SERVANTS OR INDEPENDENT CONTRACTORS—LIABILITY OF EMPLOYERS.

Marshall v. *Lindsey County Council.* [1935] 1 K. B. 516.

MRS. M. was admitted to the defendant's maternity home for her confinement on July 12, 1933. On July 4 another patient Mrs. F. had been removed to a general hospital suffering from puerperal fever, a highly infectious disease from which she subsequently died. Other patients contracted the same disease and Mrs. M. also caught it while in the home, suffering a severe illness in respect of which she sued the Council alleging breach of duty in three respects: (i) not closing the home to new patients after July 5; (ii) not taking adequate measures for disinfecting the home; (iii) not telling her or her husband or her doctor of the previous cases of puerperal fever. The jury found for her on all points and awarded £750 damages. The decision was affirmed by the Court of Appeal [Greer, Maugham and Roche L.JJ.; but Maugham L.J. dissented as to (iii)].

As regards (i) and (ii) all the L.JJ. were agreed that the defendants could not be held liable; in both cases the decisions were taken by the doctors. The judges followed the decision in *Evans* v. *Liverpool Corporation* [1906] 1 K. B. 160, where the plaintiff was seeking to recover expenses incurred in consequence of his son having been prematurely discharged from the defendants' hospital and passing on the infection to his brothers. 'They [the defendants] do not undertake the duties of medical men or to give medical advice, but they do undertake that the patients in their hospitals shall have competent medical advice and attention' (at p. 165). 'It is contended that the doctor was the servant of the defendants for the purpose of discharging the child, and they are liable for his negligence, but the terms of his employment and the rules under which he acted do not bear out this contention' (at p. 166). This decision was approved and followed in *Hillyer* v. *Governors of St. Bartholomew's Hospital* [1909] 2 K. B. 820. 'The only duty undertaken by the defendants is to show due care and skill in selecting their medical staff, . . . But although they [the nurses] are such servants [of the Governors] for general purposes, they are not so for the purposes of operations and examinations by the medical officers' (per Farwell L.J. at p. 826). Kennedy L.J. says: 'It may well be and for my part I should, as at present advised, be prepared to hold, that the hospital authority is legally responsible to the patients for the due performance

of their servants within the hospital of their purely ministerial or administrative duties' (at p. 829). *Hall* v. *Lees* [1904] 2 K. B. 602 is a case on the same topic.

Greer and Roche L.JJ. upheld the jury's finding on point (iii), the matron's act being purely administrative and performed as a servant of the defendants.

The basis of the judgment of Maugham L.J. is that the man in the street (or on the Clapham omnibus) is not fitted to decide the merits of different medical techniques. This view is also put forward by the Privy Council in *Vancouver General Hospital* v. *McDaniel* [1934] W. N. 171 (also reported in 152 L. T. 56), a case arising out of alleged negligent isolation. 'In their Lordships' opinion the appellants showed that they had acted in accordance with general and approved practice and accordingly were entitled upon the evidence to succeed' (at p. 172). In this case everything done in the home during the period of infection was in accordance with approved practice. In conclusion we may state the two chief points in the case: (i) doctors are almost invariably independent contractors and solely responsible for their own negligence; (ii) nurses except when directly under the control of a doctor are servants.

G. T. H.

TORT—INVITOR AND INVITEE—NEGLIGENCE—DISCHARGE OF CARGO FROM BARGE — HATCH-COVERS IMPROPERLY USED AS LOADING-STAGE — INJURIES TO STEVEDORES—IMPROPER USE OF PREMISES BY INVITEE.

Hillen and Pettigrew v. *I.C.I. (Alkali), Ltd.* [1936] A. C. 65.

H. AND P., the appellants, were stevedores employed by the owners of the *S.S. Darro* and were loading cargo into that ship from a barge belonging to the respondents. The barge had one long hold covered by a hatch composed of twenty hatch-covers. After removing a number of bags from the hold, the crew of the barge replaced the hatch-covers in order to sling on board the *Darro* a number of kegs which had been placed on the narrow deck. The engineer of the barge threw a sling on to one of the hatch-covers, and probably told H. and P. that it would be all right. The appellants placed seven kegs in the sling; on moving the eighth, the hatch-covers gave way and the appellants fell into the hold and were injured.

H. admitted that he knew it was dangerous and improper to load cargo off hatch-covers.

Goddard J. decided in favour of H. and P., but the Court of Appeal reversed this decision on the ground that loading cargo from hatch-covers was illegal as contrary to Regulation 34 (b) of the Docks Regulations, 1925 (though there was some argument whether this Regulation applied), and that consequently there was no obligation on the part of the barge owners to make this illegal operation safe.

The House of Lords upheld the decision of the Court of Appeal but on different grounds. The Docks Regulations were not considered at all, nor were counsel for the respondents called upon to argue.

Three points emerge from the decision:

(1) H. and P. claimed that they had been invited on to the barge

in pursuance of business common to them and the respondents; that they were therefore invitees and that consequently the respondents owed them a duty to take reasonable care to see that the barge was reasonably safe or at least to warn them against any hidden danger of which they were unaware but which was known or ought to have been known to the respondents or their servants. This argument was negatived, the House holding that the duty of the invitor to the invitee exists only so long as the invitee is making an ordinary and reasonable use of the premises for the purposes for which he has been invited. If he makes an extraordinary and unreasonable use of the premises, he is a trespasser and must take the premises as he finds them.

(2) Alternatively, H. and P. claimed that if there were no general invitation to use the hatch, yet the crew of the barge, the respondents' servants, extended a special invitation to use the hatch for the particular purpose; that they knew of the danger; and that they neglected to give warning. But it was held that, even if there were such an invitation, it was entirely outside the scope of the authority of the crew. The crew of a barge had no authority to use or to invite persons to use the barge for purposes known to be extraordinary and dangerous.

(3) Finally, Lord Alness pointed out that H. had admitted that he knew it was 'wrongfully dangerous and should not be done'. He held that it was a clear case of contributory negligence which furnished a complete answer to the claim.

No new point of law is to be found in this case, but it affirms the principle followed in *Mersey Docks and Harbour Board* v. *Procter* [1923] A. C. 253 and *Walker* v. *Midland Ry.* (1886) 2 T. L. R. 450 as to the extent of the duty of the invitor to the invitee.

P. M.

TORT—STRICT LIABILITY UNDER RULE IN *Rylands* v. *Fletcher*—ACT OF STRANGER—NUISANCE—NEGLIGENCE.

Northwestern Utilities, Ltd. v. *London Guarantee and Accident Co., Ltd.* [1936] A. C. 108.

A HOTEL belonging to X and insured by the Y Insurance Company was destroyed by fire caused by the escape and subsequent ignition of natural gas which percolated through the soil into the hotel basement. The escape was from a fractured welded joint in a pressure main belonging to N. U. Ltd., which supplied gas to the city of Edmonton. X and Y sued N. U. Ltd. (i) for permitting gas, a dangerous substance, to escape; (ii) for breach of a local Gas Act; (iii) for nuisance; (iv) for negligence in that N. U. either knew or ought to have known what work the city was doing and failed to take, as they could and should have done, all proper precautions to prevent the escape of dangerous gas which they were carrying in their mains. The fracture in the joint was itself caused by the operations of the city of Edmonton in constructing a storm sewer immediately beneath the N. U.'s main.

On ground No. (iv) the Judicial Committee gave judgment for X and Y. Lord Wright, who delivered the judgment, said there was no

doubt but that gas in this connection was a dangerous thing and the appellant thus *prima facie* came within the rule of *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330. That rule applied not only where a person accumulated a dangerous thing on his land, but also where a company carried gas in pipes under a public highway, in pursuance of a franchise; *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* [1914] 3 K. B. 772. His Lordship went on to enumerate some of the defences which were applicable, such as act of God, statutory authority, and finally that the damage was caused by the independent and conscious act of a third party (*Box* v. *Jubb* (1879) 4 Ex. D. 76, approved by the Judicial Committee in *Rickards* v. *Lothian* [1913] A. C. 278); and he also pointed out that while liability of the *Rylands* v. *Fletcher* type is different in many respects from liability for nuisance, yet the two often overlap, and that one instance of this is the applicability to both of the defence that the harm arose in the proper pursuance of statutory powers and was not brought about by any negligence on the part of those who exercised the powers.

The statutory authority was in this case sections 11 and 13 of the Alberta Water, Gas, Electric, and Telephone Companies Act, 1922; but as Lord Wright pointed out it imposed no greater duty than the rule in *Rylands* v. *Fletcher*, and whether or not it applied was immaterial. The real defence of N. U. was that the damage was caused by the act of the city, for which they were not responsible, and which they could not control, and that they were guilty of no negligence in the matter. The authorities showed that, though the act of a third party may be relied on by way of defence in cases of this type, the defendant may still be held liable in negligence if he fails in foreseeing and guarding against the consequences of the third party's act. On the facts their Lordships held that N. U. had given the matter no thought; they had left it to chance, though it must have been obvious that such excavations were being carried on and that damage to their mains might result. On such conclusions their Lordships found for the respondents.

Thus it would seem that an answer has been found for the query in Salmond, Torts, 8th ed., p. 583: 'Although an occupier is not absolutely responsible for damage done by an act of a trespasser or other stranger, it may be that he is subject in certain cases to the lesser obligation of using reasonable care to prevent such damage. On this point, however, there seems to be no authority'. A man is not to be excused from the results of his carelessness in failing to foresee that certain acts of a stranger may let loose a dangerous substance and cause damage, even though such damage would never have been caused but for the stranger's act.

This decision is a logical application of the rule in *Rylands* v. *Fletcher*; for if a man chooses to bring on to his land anything likely to do damage if it escapes, it is reasonable that the totally unexpected act of a stranger in causing such an escape should furnish a good defence; but it is unreasonable that if a man is under a strict liability he should avoid it by negligence in omitting to take steps to prevent such a result of a stranger's act.

R. L. P.

BOOK REVIEWS.

Modern Equity. Being the Principles of Equity. By Harold Greville Hanbury, B.C.L., M.A., Fellow of Lincoln College; University Lecturer in Equity; Tutor, Law Society's School of Law; of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1935. l and 735 pp. (30*s.* net.)

Over a period of several years the occasional publication of articles on equitable topics from Mr. Hanbury's pen had brought the teaching and practising profession to the realization of the fact that a stimulating and erudite writer had made his entry upon the legal scene. Mr. Hanbury's scattered contributions were brought together in the volume entitled *Essays in Equity* (1934), and not long afterwards there appeared his *Modern Equity* (1935), a systematic treatise that had long been awaited with interest by those of his friends who knew that he was at work upon it. Their expectations, fostered by a reading of the volume of essays, have been fully realized; for *Modern Equity* is a monument not only to patient industry in the assembling of materials, but to a scholarly mastery of equitable principles and to their presentation in a virile and lucid style calculated to invest the whole subject with a living interest. This is still further increased through the introduction of fresh and striking similes (see, *e.g.*, p. 7, the Valley of Humiliation) and of illustrations drawn from life as well as from law.

Although in certain parts of the work, more particularly the one devoted to historical development (pp. 1—27), Mr. Hanbury has relied chiefly on secondary authorities, in the main the exposition of modern equitable principles, which was the leading object, is based upon his own first-hand, painstaking, and scholarly examination of the decided cases. This fresh survey of the case-law of Equity, to which have been added the author's own enlightened interpretation and constructive criticism, forms one of the principal features of the treatise; and it is a valuable contribution to legal learning. There is, moreover, another feature of the work which deserves special notice. In all parts of the exposition, including that extensive and most important part devoted to the law of trusts, Mr. Hanbury has dealt frankly, using the skill and learning of a master of equitable doctrine, with the difficulties that now arise in deciding how far traditional rules of Equity, enshrined in the cases, have been modified by recent property legislation. This detailed and symmetrical survey of the effect of statute-law upon case-law embodies, moreover, a careful consideration of the judicial interpretation of the Property Acts; and it includes, in addition, the author's own views as to the meaning and effect of portions of the work of Parliament. By means of a method which combines criticism with analysis Mr. Hanbury

has enabled us to envisage in clear perspective the Equity of our own day as a system of principles that has emerged from the judicial process, but with substantive modifications introduced by a mass of legislative enactments; and throughout this long exposition he has never once lost sight of the fact that Equity, as a supplementary system, has important relations to the Common Law. This study of the changes in equitable doctrine due to the reform of our property law by statute forms an original contribution to legal science that is of outstanding importance; and it can hardly fail to exert an influence on the future course of adjudication and legislation in matters involving the resort to equitable principle for the solution of legal problems.

Mr. Hanbury's treatise is composed of three Books. Book I (pp. 1—123), which is introductory, contains chapters on the history of Equity, the doctrine of *bona fide* purchaser, the juristic nature of equitable rights and interests, the maxims of Equity, and the relations of Equity with the Common Law. Book II (pp. 124—451), which covers slightly more than one-half the text, is devoted to trusts; while Book III (pp. 452—627) has chapters dealing with the administration of assets, satisfaction and ademption, election, specific performance, injunctions, cancellation and rectification, and 'miscellaneous activities of Equity'. In the latter chapter (pp. 622-27) the author has glanced at 'some fields into which the genius of Equity, sometimes almost *malgré lui*, has made incursions', namely, the law of fixtures, the Rule in *Ex p. Waring* (1815) 19 Ves. 345, and the doctrine of subrogation. The work contains a table of cases (pp. xi—l) and an index (pp. 629—735). There is no table of statutes; but the index includes these.

In a short notice of Mr. Hanbury's book it is manifestly impossible to comment in detail upon any one of its many topics; and, hence, a few general and fragmentary observations must suffice. Thus, for example, it may be remarked that the work does not quite cover the whole field of equitable jurisdiction. Partnership and the guardianship of infants have been intentionally omitted altogether as being 'specialized matters' based largely on statute-law (p. vi). Other topics, such as partition, seem also to have been omitted; while certain other subject-matters, such as set-off (p. 68), suretyship (pp. 80-1, 113-14, 625), and subrogation (pp. 625-7), have received but scant attention. On the other hand, certain other headings of equitable jurisdiction, such as fraud, mistake, accident, liens, and married women's property, have been more fully studied by the author, even though they do not appear in the table of contents: references to them must be sought in the index. One can but regret that some subject-matters have not been brought more completely under Mr. Hanbury's scrutiny; for certain of them, such as suretyship and subrogation, offer excellent opportunity for the study of equitable rights (see, *e.g.*, Professor Morton Carlisle Campbell's 'Protection against Indirect Attack', *Harvard Legal Essays*, 1934, pp. 3—37, and Professor Langmaid's 'Some Recent Subrogation Problems in the Law of Suretyship and Insurance', *Legal Essays in Tribute to Orrin Kip McMurray*, 1935, pp. 245-76, in both of which essays regard is paid to English authorities). Mr. Hanbury's chief attention has been devoted, in fact, to the present-day law of trusts, 'the mainspring of Equity' (p. vi), and his work, including its omissions, must be judged from this angle. The pursuit of his main object explains, for example, why his historical sketch is so slight (pp. 1—27) and why he has placed the doctrine of

bona fide purchaser in a prominent place at the beginning of his treatise (pp. 28—53).

Two omissions from Mr. Hanbury's historical chapter may be mentioned briefly. Although he deals with the effect of the Statute of Westminster II, Chap. 24 (*in consimili casu*), he has referred neither to Professor Plucknett's somewhat startling view that the Statute was not the base and origin of the Action on the Case ('Case and the Statute of Westminster II', *Columbia Law Review*, May, 1931), nor to Sir William Holdsworth's attack upon that view (*Law Quarterly Review*, July, 1931): this controversy has reached, since the appearance of Mr. Hanbury's volume, a further stage (see 'The Action on the Case and the Statute of Westminster II', by Mr. P. A. Landon, *Law Quarterly Review*, January, 1936). Again, although Mr. Hanbury has alluded to the fact that 'a kind of Equity was administered by the General Eyre' by means of bills in eyre (p. 5), he has failed to state that the early Common Law Courts also administered Equity, before the rise of the Chancellor's jurisdiction, by using the writs (for example, the writ of prohibition) in the development of a procedure that was similar to the Chancery procedure *in personam*. Mere footnotes would have brought Mr. Hanbury's historical account into line with the results of recent research on these two points.

Attention may be drawn to one special feature of Mr. Hanbury's arrangement of subject-matters: he includes mortgages under trusts, regarding mortgages primarily as trust investments, and examines them from the view-point of the mortgagee rather than that of the mortgagor (see pp. vi, 393-5). It may well be thought by many Equity lawyers that the several reasons advanced in support of this arrangement (see p. 393) do not justify the abandonment of a separate category for mortgages in the scheme of equitable institutions. As Mr. Hanbury's main interest was centred in the trust, it was no doubt convenient for him to consider mortgages as one of the principal species of trustee investments. But the fact remains, as Mr. Hanbury himself admits, that in the study of the mortgage it is essential to consider the rights of the mortgagor as well as those of the mortgagee. The mortgage and the trust are, in truth, two distinct and different institutions, even though in their historical development and in their present structure they have certain features in common: thus, for example, the equity of the mortgagor and the equity of the beneficiary, although not identical, are equitable rights which possess some common characteristics. A mortgage is not a trust, even though it may be used as a trustee investment; and, although no Equity lawyer, least of all Mr. Hanbury himself, would deny the truth of this statement, it may be suggested, with respect, that the placing of mortgages under trusts, as trustee investments, tends to blur, in the mind of the beginner, the fundamental differences between the two institutions.

In his *Essays in Equity* Mr. Hanbury considered at some length the problem (not merely academic, but also practical) as to the nature of equitable rights and interests; and in *Modern Equity* he has in many places elaborated his view that 'an equitable interest is far more robust than a mere *ius in personam*' (p. 54), and that, indeed, 'equitable interests must be regarded as hybrids, midway between *iura in rem* and *iura in personam*' (p. 62). Mr. Hanbury holds that 'the really vital flaw, which spoils the completeness of Maitland's scheme [of equitable rights as purely *iura in personam*], rests in the right of the

beneficiary to follow trust funds' (pp. 20, 54—62). Mr. Hanbury also mentions, but somewhat surprisingly does not stress, the point (p. 52) that, in the well-known words of Professor Hughes, 'a registrable equity if registered is as much a *ius in rem* as a legal interest' (*Journal of Society of Public Teachers of Law*, 1930, p. 17). In 1931 Professor Winfield lucidly compared the views of the 'personalist' and 'realist' schools of thought with respect to the nature of equitable rights (*Province of the Law of Tort*, pp. 109 ff.). Since that time Mr. Hanbury has made, both in *Essays in Equity* and in *Modern Equity*, a further and a fruitful contribution to the literature of this juristic controversy.

Mr. Hanbury's thesis that Equity is capable of study both as a separate system and also concurrently with Law (pp. v—vi) has been admirably and successfully defended in *Modern Equity*. This is one of the most important books on English Law that have appeared during the last decade; and it will be prized by all teachers and students and not less by all judges and practising lawyers who are obliged to concern themselves with the intricate but fascinating problems of Equity. The learned author is to be congratulated, warmly, upon the brilliant completion of a task which must have cost him great labour.

H. D. H.

Legal Essays in Tribute to Orrin Kip McMurray. Edited by Max Radin and A. M. Kidd. University of California Press, Berkeley, California, and Cambridge University Press, Cambridge, England. 1935. x and 694 pp. (30*s.* net.)

Twenty-four colleagues and former pupils have presented to Dean McMurray, of the School of Jurisprudence of the University of California, 'in commemoration and in grateful appreciation of the scholar and in love and affection for the man,' a volume of essays which constitutes a notable contribution to the literature of the law.

The law of antiquity is admirably represented by Professor A. Arthur Schiller's 'Business Relations of Patron and Freedman in Classical Roman Law'; while Dr. Frank I. Schechter's 'Law and Morals of Primitive Trade' gives the historian of European commercial law an excellent opportunity of comparing the similar developments that are to be found in the customs of primitive peoples in many parts of our modern world. Of equal interest, from the view-point of comparative legal history, is 'The Story of the Criminal Jury in the Civil Law and in the Common Law' written by the Hon. Robert L. Henry, now a judge in the Mixed Courts of Egypt. Instructive studies in modern comparative law, wherein due regard is also paid to historical development, are Mr. William E. Colby's 'The Freedom of the Miner and its Influence on Water Law' and Professor Louis Josserand's 'La Protection des Faibles par le Droit'; while of great value to the student of the present-day law of France is Professor Henri Capitant's essay on 'La "Propriété Commerciale"'. Illuminating studies of certain aspects of the law of England and of the States of the American Union are Professor Sayre Macneil's 'Growing Lawlessness of Trees' and Professor William E. Masterson's 'Specific

Performance of Contracts to Deliver Specific or Ascertained Goods under the English Sale of Goods Act and the American Sales Act'. Equity is also ably represented by the essays of Professor Stephen I. Langmaid on 'Some Recent Subrogation Problems in the Law of Suretyship and Insurance', and of Professor George P. Costigan, Jr. on 'Those Protective Trusts which are Miscalled "Spendthrift Trusts" Reëxamined': the latter author holds that '"spendthrift trusts" do not deserve condemnation: they should receive instead, on their merits, a more sensible and sympathetic application', a view somewhat opposed to that of another scholar who has recently examined the same problem (see Professor Austin W. Scott's 'Protective Trusts', 'Harvard Legal Essays, 1934'. pp. 419—32). Professor Justin Miller's essay in analysis is upon 'The Criminal Act', an interesting contribution to the present volume taken from the author's 'Criminal Law' (1934); and, holding that 'in the development of the law of water rights, the Supreme Court of California has a record of constructive juridical accomplishment unexcelled by that of any other Court in the United States', Professor Joseph W. Bingham presents 'Some Suggestions concerning the California Law of Riparian Rights', an essay which well repays a careful examination. Students of the American Restatement of the Law, now in progress, should not neglect Professor Hessel E. Yntema's essay dealing with 'The American Law Institute'.

American constitutional topics form the subject-matter of several valuable essays: 'The Constitution as an Institution', by Professor Karl N. Llewellyn; 'Our Non-Citizen Nationals, Who are They?', by Professor Dudley O. McGovney; 'The Constitution and the Recovery Legislation: the Rôles of Document, Doctrine, and Judge', by Professor Douglas B. Maggs. Equally valuable are the essays on the Courts: 'The Reality of what the Courts are Doing', by Professor Francis H. Bohlen; 'Instructing the Jury upon Presumptions and Burden of Proof', by Professor Edmund H. Morgan; 'Army Courts-Martial', by Captain Hubert D. Hoover, of the Judge Advocate General's Department, United States Army; 'Jurisdiction Following Seizure or Arrest in Violation of International Law', by Professor Edwin D. Dickinson; 'International Engagements and their Interpretation by the Permanent Court of International Justice', by Professor Manley O. Hudson.

Constructive jurisprudential thought is not absent from several of the essays which have already been mentioned; but in three further contributions Jurisprudence forms the main theme. In 'The Scientific Rôle of Consideration in Contract' Professor John H. Wigmore, with his accustomed felicity, penetration, and skill, subjects to analytic comparison the three obligations formed by Contract, Deceit, and Estoppel, 'three obligations as species of a single genus', the 'Assertory-Obligations, or Obligative Assertions'; and, while it must be left to the reader to envisage in clearer perspective Professor Wigmore's valuable discovery of this 'triple juristic relationship', it may be noted that in his judgment the practical consequence of this discovery is to 'salvage Consideration from the scrap heap', since an analysis of the relation of Contract to Deceit and Estoppel demonstrates conclusively that 'Consideration has a distinctive, vital, and permanent function in the formation of a contract' (pp. 642, 653-4). Professor Max Radin's essay, entitled 'A Juster Justice, a More Lawful Law', is a stimulating contribution to our knowledge of the place held by Equity in ancient, medieval, and

modern legal thought. In 'More about the Nature of Law' Dean Roscoe Pound, everywhere acknowledged as one of the greatest of modern thinkers in the realm of Jurisprudence, makes a further contribution to the study of the nature of Law, a subject which he has already illumined in many of his books and articles.

Although this bare list of twenty-four titles may help to give the reader some indication of the wide range of subject-matter covered by this festal volume of essays, at the same time it leaves no space in the present notice for comment upon the conclusions reached by the authors. It must suffice, therefore, to remark in general terms that the book not only embodies the results of much patient and learned research among the primary sources of the law of several countries, but contains also historical surveys of no little importance. In it there is, in addition, the freshness incident to the re-examination of aspects of legal growth by scholars whose minds have been trained in scientific methods of accumulating knowledge and of subjecting such knowledge to a criticism based on the recognition of the fact that the law of our time governs a dynamic, not a static, society. A portrait of Dean McMurray forms a frontispiece to the volume, while a partial list of some of his published writings is placed at its end; and, as remarked by the author of the 'Foreword', which is an appreciation of the work of Dean McMurray, if there is one note more dominant than others in his own contribution to legal literature, it is the relation of law to life (p. 3). It is appropriate, therefore, in a volume presented to a scholar with this enlightened grasp of the law's function, that the progressive tendencies of legal development, introduced to meet the needs of social change, should give to the volume one of its main features—its alertness to dynamic processes in the society of individual States and of the international community at the present day. As a contribution to the solution of the vast problem of adjusting traditional law to the life of the modern world in motion, this *Festschrift* in honour of Dean McMurray deserves the study of all those persons who are concerned with the tasks of instruction, adjudication, and legislation. Not only the essays on present-day law in England, America, and France, but also those which deal with legal history, legal comparison, and legal thought, throw light upon and help to solve that problem; and its solution is essential, not merely desirable, if law, as opposed to force, is to govern the world of this generation and of the next.

H. D. H.

Primitive Law. By A. S. Diamond, M.A., LL.M. London: Longmans, Green & Co. 1935. x and 451 pp. (25*s.*)

Mr. Diamond's book is a controversial attack, along the whole line, upon the doctrines of Sir Henry Maine. These doctrines are summarized at the outset in a quotation from 'Ancient Law'. Since this quotation indicates the scope of the book, it seems desirable to reproduce it here. 'Law is derived from pre-existing rules of conduct which are at the same time legal, moral and religious in nature. The severance of law from morals and of religion from law belong only to the later stages of mental progress. . . . When law first meets us in any recognisable form,

it consists of "themistes", or judgments of Kings, which in the course of time give rise to customs. So we reach the epoch of customary law. Meanwhile oligarchies succeed to the government of Kings, and with the invention of writing, Codes of law make their appearance. . . . As yet there is no notion of a legislature, nor even of a lawgiver, and the prevalent conception of a custom or law is that it does not and cannot change. The subsequent development of law takes place in the first stage, by means of fictions; in the second by equity, and only in the third and last stage of all, by legislation. And throughout this history, ancient law has retained as its fundamental characteristic a love of technicalities and of formalism. In the mind of early man a rule of procedure predominates in importance over a rule of substance; so that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms. This characteristic of early law, namely its love of formalism and technicality, determines also the growth of the law of contract. What in early times the law arms with its sanctions is not a promise, but a promise accompanied with a solemn ceremonial.' At the close of this quotation Mr. Diamond throws down his glove. 'There is no substance in any of these conclusions; indeed the contrary can be clearly demonstrated by evidence.' The rest of the book is devoted to the production and exposition of the evidence thus invoked.

The first and most fundamental of Mr. Diamond's theses is that primitive law has no connection with religion. In support of this contention he examines in turn the legal antiquities of the Babylonians, the Assyrians, the Hittites, the Jews, the Hindoos, the Romans, and the Anglo-Saxons, and claims to demonstrate in each instance that the most primitive legal institutes of these various peoples are purely secular in character, and that any signs which the surviving texts may show of preoccupation with religious and ritualistic interests may be ascribed to priestly influences supervening at a later stage. The point is driven home by a chapter devoted to showing, with illustrations from Greece and from Iceland, that 'the notion . . . that homicide is wrongful made its appearance in the religion after it had appeared in the law, and [that] it was derived from the legal notion and was a religious abstraction from it. Having once developed, the religious doctrine did not produce an enlightened amendment of the law, pardoning a slayer innocent of malice; religion performed its normal function in relation to law, namely that of resisting change'.

Other chapters deal with the specific topics of Marriage, Inheritance, Property, Criminal Law, and Civil Injuries. In these chapters a great deal of information is collected which seems of more value for its intrinsic interest than as evidence in support of the indictment. But the author does not forget the task he has set himself. Having discredited religion as a source of law, he submits the other articles of Maine's doctrine to equally vigorous though less lengthy criticism. Deliberate legislation is not a late, but a very early, mode of law-making. 'Legal Fictions' and 'Equity' are phenomena belonging not to an early, but to a very late, stage of legal development, namely to a stage when the law is already crystallized. The doctrine that primitive law is more concerned with procedure than with substantive principle is not borne out either by the Codes of the ancient East, or by the laws of the Germanic tribes.

The range of Mr. Diamond's learning is impressive, and it would

require equal learning, and an equally long book, adequately to test his novel conclusions. But Sir Henry Maine starts with an initial advantage; not only is he '*beatus possidens*', but his doctrines appeal, or seem to appeal, to common sense. It will take a good deal to persuade most people that the social psychology of nascent man did not begin with an undifferentiated complex of law, religion, custom and morality. And the effectiveness of Mr. Diamond's arguments is weakened by his too conspicuous zeal. The present reviewer, at any rate, has not always felt satisfied that the evidence placed before the reader was adequately veiled in a due haze of doubt. To take two examples: the author states, as a matter of common knowledge, that writing was not in use by the general population of Rome before the year 200, whereas Professor Frankel places the attainment of this art three centuries earlier.[1] In another place Mr. Diamond remarks that 'there appears to be no ancient Code or modern tribe among whom the bride-price is fixed'. Surely the thirteen deniers which Louis XVI paid for Marie Antoinette had an ancient history.

We may conclude with a remark, which is hardly a criticism of Mr. Diamond, upon the difficulty of disentangling comparative law from philology. When we are told, for example, that 'the Code of Hammurabi enacts "that if a man has married a wife and has not laid down her bonds, that woman is no wife"', we are reading into the cuneiform symbols rendered by the words 'married' and 'wife' all the associations created by two thousand five hundred years of Roman, Germanic, and Judaeo-Christian legislation and ethics.

M. S. A.

The Law of Wills. By S. J. Bailey, M.A., LL.M., of the Inner Temple, Barrister-at-Law; Fellow of St. John's College, Cambridge. London: Sir Isaac Pitman & Sons, Ltd. 1935. xxiv and 211 pp. (15*s.* net.)

Author and publishers are to be congratulated on an admirable project excellently executed in this latest addition to Pitman's Equity Series.

It is preceded by a short introduction by Dr. G. W. Keeton, general editor of the series, from which it is clear that he shares the views of Professor Holdsworth and others as to the desirability of keeping legal and equitable principles distinct in legal training. We are convinced that Equity should be taught as a separate subject, at any rate in the early stages of a student's training.

The author expresses the hope that his treatment of the principles of Law and Equity concerning wills will leave the reader suitably equipped to consult the larger practitioners' treatises. It will do this and more: it will provide him with a solid foundation, in itself sufficient for most examinations, to which more detailed knowledge will readily adhere. The book covers the nature of wills, capacity, execution, revocation and revival, legacies and equitable doctrines affecting them, conditions, rules against remoteness, construction—a more comprehensive survey of the subject than is to be found in any work of the same length.

[1] 'Rome and Greek Culture', by Professor Edward Frankel, p. 7.

Reading the book from cover to cover has failed to reveal any defect or, having regard to the object of the work, any omission, of great substance, but there are a few misprints and minor inaccuracies which should be corrected when a new edition is prepared.

On p. 55, in discussing section 51 (3) of the Administration of Estates Act, 1925, it is stated that for the section to apply the infant must have died 'unmarried'. The Act says 'without having been married': youthful widows and widowers are not concerned.

Where a gift of an entailed interest is saved by section 32 of the Wills Act, 1837, it may be that, as Mr. Bailey unequivocally asserts, the donee's will can bar the entail under section 176 of the Law of Property Act, 1925 (p. 62). But it cannot be predicated with certainty that the donee can be said to be in possession within the section.

In dealing with advancement under section 32 of the Trustee Act, 1925, it is not made clear that the section has no application to instruments which came into operation before 1925 (p. 80).

At p. 120, *Re Chardon* [1928] 1 Ch. 464 is given as authority for the rather surprising statement that 'if the purpose is non-charitable, the trust is invalid unless its terms permit the whole of the trust property to be distributed at once'. This may be justifiable, but it is certainly misleading.

P. 149, second paragraph, is, it is submitted, too wide. The author states that extrinsic evidence of the testator's actual intentions is available to solve any equivocation, whether patent or latent, in the construction of a will, citing *Doe* d. *Gord* v. *Needs* (1836) 2 M. & W. 129. But the judgment of Parke B. in that case and the decision in *Re Gregson's Trusts* (1864) 2 H. & M. 504 seem to show that this requires modification. *Doe* v. *Needs* does show that extrinsic evidence may be admitted though another part of the will shows that there is more than one person answering the description, but is it authority for any larger extension than this? At any rate such evidence cannot be admitted where a blank for a Christian name indicates a possibility that no certain object had been selected.

On the present unsatisfactory state of the authorities it can only be said that the line probably lies somewhere between Mr. Bailey's view and the common text-book statement that evidence of actual intentions is admissible only when the ambiguity becomes apparent when it is attempted to give effect to the will.

We noted the following misprints: at p. 19, l. 30, 'it to' should be 'to it'; p. 36, l. 25, 'embodies' should be 'embodied'; p. 45, l. 11, 'had' should be 'has'; p. 75, l. 5, 'rule' should be 'rules'.

R. H. K.

The Law of Banks and Banking and Bills of Exchange. By J. D. Falconbridge, M.A., LL.B., K.C., Dean of the Osgoode Hall Law School, Toronto. Fifth edition. Toronto: Canada Law Book Co. 1935. lxv and 1030 pp.

The fifth edition of this well-known work on the law of banking and negotiable instruments is a worthy successor to the editions which have preceded it. The main reason for its preparation was the revision of

the Canadian Bank Act in 1934 and the incorporation in the same year of the Bank of Canada, but the learned author has also seized the opportunity thus afforded to introduce into the text certain changes which undoubtedly increase its value to English as well as Canadian lawyers. There are certain features of Dean Falconbridge's treatise which, in the opinion of the writer, render it indispensable to the commercial lawyers of the Empire. We have been content in England to reproduce editions of standard works on the law of bills of exchange in which the growth and development of the rules are largely relegated in an atrophied form to footnotes and appendices so that the reader is often driven to form his own conclusions as to the effect of recent case-law on the statements contained in the body of the text. This is not Dean Falconbridge's method. In the edition under review the text is re-written wherever necessary and in this connexion attention may be directed, in particular, to the treatment of the liabilities of anomalous endorsers of bills of exchange, which has been elucidated recently in such cases as *National Sales Corporation* v. *Bernardi* [1931] 2 K. B. 188. It is also interesting to note that the law relating to pledges of documents of title has been modernized in Canada, whereas the long-suffering English merchant still has to make the best of the badly drafted and incomplete provisions of the Factors Act of 1889. But perhaps the most valuable attribute of the book, so far as English lawyers are concerned, is to be found in the chapters which deal with conflicts of law arising out of negotiable instruments. This, alone, would be sufficient to establish the claim of this work to a place on the bookshelf of every teacher or practitioner who has to deal with commercial law. One may sometimes disagree with the learned author's conclusions, but he is always stimulating and very much to the point. Canadian legal decisions contain a wealth of material on matters of conflict which is too frequently ignored by English writers, and Dean Falconbridge furnishes us with the key to the repositories in which it is stored. A reflection which occurs to the writer is that more attention should be paid by English lawyers, not merely in this instance but also in general, to the case-law of Canada and to the measures of law reform which have been introduced in the Dominion. We have been rebuked in this connexion, with justice, by American critics.

In conclusion there is another feature of this very important treatise which must not be overlooked. It is probably the only work of its kind in our language which recognizes the importance of the comparative treatment of the subject. Those who have doubts as to the value of the comparative method of legal research should turn the pages of Dean Falconbridge's book and investigate the question for themselves. They cannot fail to be convinced.

H. C. G.

An Introductory Survey of the Sources and Literature of Scots Law. By various authors. With an Introduction by the Rt. Hon. Lord Macmillan, P.C., LL.D., Lord of Appeal in Ordinary. Stair Society Publications, Vol. I. Edinburgh: Printed for the Stair Society by Robert Maclehose & Co. 1936. xv and 486 pp.

This inaugural volume of the Stair Society, which, on the pattern of the Selden Society, was formed 'to encourage the study and advance the knowledge of the history of Scots Law', is the first comprehensive survey of the sources and literature of Scots Law ever to make its appearance. An admirable, but short, Introduction by Lord Macmillan, President of the Stair Society, explains the purpose of the volume. 'It does not profess to be either exhaustive or final', he tells us, 'for much of the ground which it covers has hitherto been little explored, and some of it is almost virgin territory'. No doubt further research, which the Stair Society was formed to promote, will in time add to the information contained in this volume. But, while awaiting the further publications of the Society with interest, and indeed impatience, legal scholars, including the historians of English Law, will welcome this volume as an introduction to the history of Scots Law from the view-point of its sources and literature. It is indeed a fortunate circumstance that, in the presentation of this volume, the Stair Society has so successfully begun its labour of rescuing the history of Scots Law from its long neglect.

The reader of the volume must agree with Lord Macmillan when he says that Mr. Hector McKechnie, the Literary Director of the Stair Society, 'has shown himself indefatigably competent'. The volume consists of thirty-eight articles, arranged in four sections as follows:— I. Native Sources, such as statutes, law reports, and institutional writers; II. Non-Native Sources, such as the Roman, Canon, and Feudal Laws, the influence of English Law, and French and Dutch influences; III. Indirect Sources, such as Charters, Cartularies, Notarial Protocol Books, and Style Books; IV. Special Subjects, such as Admiralty and Maritime Law, Celtic Law, Constitutional Law and History, Criminal Law, and Judicial Administration in Session and Justiciary. Each of these four sections contains from six to thirteen articles. Each article consists of (i) a list of the Sources or Repositories, (ii) a Commentary upon these, and (iii) a note of the Literature upon the subject.

As it is manifestly impossible to comment in the present place upon even one of these thirty-eight valuable articles, it must suffice to remark that all of them have been written by well-known historical and legal scholars, each one of whom has special competence within the field which he has chosen. Thus, for example, Lord Thankerton deals with the Statutory Law, Dr. F. P. Walton with the Courts of Officials and the Commissary Courts, the Hon. Lord Wark with the Law of Nature, Dr. Annie I. Cameron, Diplomée of the Vatican in Palaeography, with the Vatican Archives, Professor R. K. Hannay with Judicial Administration, and Mr. E. J. MacGillivray with the Influence of English Law. It is not too much to say that this book, composed in the best traditions of Scottish scholarship, will prove to be an invaluable guide. It will be profitably consulted by English legal historians, and indeed by all

scholars who concern themselves with comparative legal history; while to the law student and the practising lawyer in Scotland it will provide useful information on a variety of topics.

H. D. H.

Das englische Konkursrecht. Von Dr. Felix Eckstein. Berlin und Leipzig: Walter de Gruyter & Co. 1935. xv and 351 pp. (RM. 10.)

This treatise on the English law of bankruptcy, which appears as Heft 12 in the series of Contributions to Foreign and International Law edited by the Kaiser-Wilhelm Institute, proves once again the very great interest of German legal scholars in the English legal system. The author presents the substantive and procedural law of bankruptcy on the basis of a thorough and nearly exhaustive examination of the cases; and in general he arranges the subject-matter in accordance with German legal *Systematik*. In the Introduction he gives a survey of the fundamental ideas upon which the law is based; and, as a preface to each of the sections of the work, he outlines the general principles. He devotes a special section to the bankruptcy of partnerships; and at the end of the book he deals briefly with the international law of bankruptcy. Dr. Eckstein has written a learned and lucid account of an important branch of English law which will be read with profit not only by lawyers in Germany and students of comparative law, but also by English lawyers. The latter class of readers will be interested to see how a foreign lawyer has dealt with a part of their own legal system.

H. D. H.

Select Cases of the Mayor's Court of New York City, 1674—1784. Edited by Richard B. Morris, Assistant Professor of History in the College of the City of New York. American Legal Records: Vol. II. The American Historical Association, Washington, D.C. 1935. vii and 777 pp.

This volume is the second in the valuable new series of 'American Legal Records' which was so successfully inaugurated by the publication in 1933 of the 'Proceedings of the Maryland Court of Appeals, 1695—1729' under the editorship of Judge Carroll T. Bond and Professor Morris (see *Cambridge Law Journal*, 1935, pp. 419-21). Professor Morris, who is solely responsible for the present volume, is to be warmly congratulated both on the admirable way in which he has presented the text of the cases and on the writing of an Introduction (pp. 1—62) that is a notable contribution to the history of law in America. With the learning and skill of an historian trained to found his account of an institution and a period on origins and early growth, Professor Morris first traces the development of the Court of the Mayor in the medieval town and then gives an historical sketch of the constitution and jurisdiction of the Mayor's Court of London and of the Dutch prototype of the New York Mayor's Court

(pp. 1—40). 'In its jurisdiction', Professor Morris has observed, 'in its procedure, and in its adherence to English local custom, the New York Court furnishes a very interesting analogy if not perfect parallel to the Mayor's Court of London' (p. 11); but, although the tradition of the London Mayor's Court was 'the fountain-head of borough justice in the colonies', including New York, the Dutch prototype of the New York Mayor's Court also influenced that tribunal, chiefly in the field of arbitration (p. 44). While the New York tribunal was modelled on the Courts of London and Amsterdam and its legal procedure bore the imprint of both Dutch and English local customs, the Dutch influence did not create a permanent system of practice, whereas the English influence was far-reaching and permanent (p. 1). A knowledge of these historical facts heighten the reader's interest both in Professor Morris's short sketch of the history of the New York Court itself (pp. 45—61) and in the collection of cases which follows it (pp. 63—747). The cases themselves are arranged under the headings of jurisdiction, procedure, persons, forms of action, commercial law, maritime and admiralty business, quasi-equity business, and crime. Professor Morris's volume thus enables the historian of English and American laws and institutions not only to observe the working of an Old World institution in America during the colonial, revolutionary, and early national periods, but also to follow the changes in transplanted substantive law and procedure due to the influences of that new environment. To the economic and social historian the volume is also valuable as a basis for the study of the life of New York as a British colonial city.

H. D. H.

The Canon Law of Wills. By Jerome Daniel Hannan, A.M., LL.B., S.T.D., J.C.D., Priest of the Diocese of Pittsburg. Philadelphia, Pennsylvania: Dolphin Press. 1935. ix and 517 pp. ($3.50.)

Canonical Evidence in Marriage Cases. By Francis Wanenmacher, Doctor in Canon Law of the Catholic University of America; Pastor Consultor and Pro-Synodal Judge of the Diocese of Buffalo. Philadelphia, Pennsylvania: Dolphin Press. 1935. xxi and 412 pp. ($3.50.)

These two volumes are welcome additions to the literature of the Canon Law of the Roman Catholic Church. Although, as remarked by Dr. Wanenmacher (*op. cit.* p. xi), 'the only universally authentic sources of present-day canon law are the Codex Iuris Canonici [1918] and the legislation that supplements the Code', expositors of the present-day law are obliged to consider not only the pre-Codex sources of canon law, but also the sources and literature of the secular law of modern States. The reader of the present volumes will find that the authors have not neglected these legal materials; and, moreover, he will also discover that they have supplied useful bibliographies and indices.

Dr. Hannan's 'Canon Law of Wills' is the result of an attempt 'to compare the principles of Roman law, modern law, and canon law, with a view to establishing a rather complete juridical theory of wills under

the canons'; and, since the Codex 'provides no explicit guidance on many of the problems that inevitably arise in the administration and execution of wills', it follows that 'much of the system thus developed [by the author] bears the very evident character of being pioneering deduction' (p. vii). From this point of view Dr. Hannan's work is of special interest. While it is impossible in the present brief notice to comment upon particular subject-matters, attention may be drawn to the fact that the volume contains much information upon the history of the canonical and secular law of wills (see, *e.g.*, the chapters dealing with the nature and origin of wills, the rights of the heirs against legatees, and the Church's executor in history).

Dr. Wanenmacher's 'Canonical Evidence in Marriage Cases' seeks to be 'a guide in the processual law (*ius processuale*) that governs the evidence in marriage cases'; and it presupposes on the part of the reader a general knowledge of the fundamental norms and theory of the substantive law (*ius substantivum*) of marriage. Although the author pays due regard to the pre-Codex sources, he does not profess to consider the law of evidence from an historical view-point; and his work is chiefly valuable as a manual on the present-day procedure of the Roman Ecclesiastical Courts, with special reference to the nature and probative force of the several kinds of evidence. Hence the principal topics are the confession and oaths of parties, the examination and oaths of witnesses, experts and physical inspection, documents, and presumptions. But, although the law of evidence forms the main theme of the author, he has been at pains to sketch the course of a matrimonial cause from the beginning to the end. He deals, therefore, with the introduction of the suit by plaint or petition, summons, joinder of issue, questioning of the parties, the production of the evidence, the discussion of the evidence, the conclusion of the trial (*conclusio in causa*), the publication of the proceedings. Of special interest are the sections devoted to procedure and proof in cases of contumacy, disparity of cult, doubt of baptism, impediments, impotence, non-consummation, nullity, and separation from bed and board.

H. D. H.

The English Legal Tradition: Its Sources and History. By Henri Lévy-Ullmann, Professor of Comparative Law in the University of Paris. Translated from the French by M. Mitchell and revised and edited by Frederic M. Goadby, D.C.L., with a foreword by Sir W. S. Holdsworth, Vinerian Professor in English Law, University of Oxford. London: Macmillan & Co., Ltd. 1935. lvi and 383 pp. (16*s.* net.)

This book was published in France as *Le système juridique de l'Angleterre* and now appears in English garb in response to a desire expressed in many quarters that it should be made available to those to whom the original in French is not accessible. The book was intended to be an introduction to the study of law by foreign students, but although

it serves this purpose to perfection there can be no doubt that it makes an appeal to a very much wider circle of readers. Professor Lévy-Ullmann has given us a very remarkable study of the structure and historical background of English law, as seen by a lawyer trained in a very different system. As Professor Holdsworth has said in his introduction to the book 'this is an achievement which is only possible to a man of great legal genius and great perseverance and industry'. It may, perhaps, be added that only those who have attempted to write about a system of law which is not their own can appreciate this achievement at its true value, and the book is beyond doubt a model to those whose researches lead them into the field of comparative law.

At the same time it is not possible to concur in Professor Holdsworth's recommendation of the book to English law students. It is in no sense a text-book and its merits will make their strongest appeal either to foreign lawyers who know their own system of law thoroughly and are anxious to see how it compares with English law, or else to advanced students of English law who wish to see their own system reflected in the mind of a lawyer of another jurisdiction.

This is an extraordinarily attractive book in many aspects. In the first place the translator has done her work in a manner beyond praise, and has succeeded in preserving the lucidity of style which is characteristic of the best French legal writers and is a marked feature of this book. Moreover, it is fascinating to follow the impression created by our law on the acute and brilliant mind of the author and to note his almost uncanny grasp of the spirit underlying our Common Law. English lawyers are not apt as such to suffer from an inferiority complex, but if there are any who labour under this complaint they can seek consolation in the very understanding and sympathetic way in which Professor Lévy-Ullmann deals with the eminently illogical and unsystematic character of our law and his recognition of the merits which it undoubtedly possesses.

H. C. G.

A Selection of Cases illustrative of English Criminal Law. By Courtney Stanhope Kenny, LL.D., F.B.A. Eighth edition, with Supplement by E. Garth Moore, M.A., of Gray's Inn, Barrister-at-Law. Cambridge University Press. 1935. xxii and 587 pp. (18*s.* net.)

The reputation of *Kenny's Select Cases* is so firmly established that it would really be unnecessary to do more than record a new edition but for the fact that this is the first to be issued since the death of the author. Mr. Garth Moore has retained unaltered all that was left by Professor Kenny, and has added some old and some new cases in a supplement. It is a pity that the opportunity was not taken at least to include the majority judgment of Blackburn J. in the case of *R.* v. *Prince* (L. R. 2 C. C. R. 154); this judgment is indeed the only one that junior students should be told to read, for the other three judgments are misleading. The mistake in the reference of *Sherras* v. *De Rutzen* might also at long last have been corrected, and it would be an improvement

to bring to notice the connexion between the judgments in *R.* v. *Jones* (12 Cox 628) and *R.* v. *Finney* (12 Cox 625). But Mr. Moore is to be congratulated on a supplement which well maintains the high standard set by the late author of the book.

J. W. C. T.

Leading Cases on Criminal Law. By A. M. Wilshere, M.A., LL.B., of Gray's Inn, Barrister-at-Law. Third edition. London: Sweet & Maxwell, Ltd. 1935. vii and 448 pp. (15*s.*)

This collection of 208 cases has been skilfully selected so as to cover a very wide field, and forms a most useful book of reference, both for readers who are already well grounded in the true principles of law which the cases illustrate, and also for those less experienced students who are under the supervision of a teacher who can emphasize those principles. This book is not intended to be a text-book and case-book in one, and therefore explanatory notes are cut down to the minimum, and in one or two cases perhaps even below the minimum. For example, it would be an improvement to direct the reader's attention to section 7 of the Forgery Act, 1913, and to section 33 (1) of the Larceny Act, 1916, in connexion with case 43 on p. 99 (*R.* v. *Prince*, L. R. 1 C. C. R. 150); and again to section 23 (1) (b) of the Larceny Act, 1916, in connexion with case 62 on p. 135 (*R.* v. *Gnosil*, 1 C. & P. 304). In addition, the case of *Eidinow* (1932) 23 Cr. App. R. 145 might well be included in the section on Evidence. These are, however, small points which must not be allowed to obscure the merits of the collection as a whole, for, as stated above, this has been extremely well chosen.

J. W. C. T.

Prideaux's Conveyancing Forms and Precedents. Twenty-third edition (in three volumes). By R. M. C. Munro and Sir L. H. Elphinstone, of Lincoln's Inn, Barristers-at-Law. Published by Stevens & Sons, Ltd., and The Solicitors' Law Stationery Society, Ltd. 1936. (£6 6*s.*)

The editors of this edition are experienced draftsmen, both of whom in their younger days were trained by Sir Benjamin Cherry, the editor of the five last preceding editions, to whom they pay in the preface an appropriate tribute. They have followed the arrangment of the twenty-second edition, except that they have transferred Leases from Volume III to Volume II. They announce that they have almost entirely rewritten Volume II, which will be published this year.

Volume I, which has already appeared, contains an introductory treatise in thirteen chapters (250 pages), and precedents relating to conditions of sale and contracts for sale, conveyances on sale, and conveyances on exchange or partition.

From the point of view of teachers of law the introductory treatise is of primary importance. It is a useful supplement to the text-book of the academic lawyer, which is necessarily based mainly on statutes and reports, whereas the practice of conveyancers has long been an important source of real property law. It may be worth while to consider whether when next a new edition is required it would not be advantageous to issue the introductory treatise in a separate volume.

It would be outside the scope of this journal to examine a work of this kind in detail. I will confine myself to one suggestion in connexion with restrictive covenants, which have recently been the subject of the involved case, *Re Union of London and Smith's Bank, Ltd.'s Conveyance* [1933] Ch. 611. It might be well to emphasize more strongly than the editors have done the importance of defining with sufficient precision the area of the vendor's land for the benefit of which the covenant is taken, and the desirability of stating, as in *Rogers* v. *Hosegood* [1900] 2 Ch. 388, that the covenant is to enure to the benefit of all the said land *and every part thereof*. There would seem to be every advantage, and no disadvantage, in making certain that an assignee of any part of the vendor's land will get the benefit of the covenant without its being expressly assigned to him.

A review, however brief, of a new edition of a work of this kind demands an acknowledgment of the debt of gratitude which the profession owes to those who undertake the exacting and thankless task of editorship.

H. A. H.

Bullen and Leake's Precedents of Pleading. Ninth edition. By Alfred Thompson Denning, of Lincoln's Inn, the Middle Temple and the Western Circuit, Barrister-at-Law, and Arthur Grattan-Bellew, of Lincoln's Inn and the South Eastern Circuit, Barrister-at-Law. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1935. lxxii and 1108 pp. (£2 10*s*.)

When we reviewed the last edition of this work in 1924 we said that it was so well known to the profession that nothing but a bad edition or a change of fashion was likely to relegate it to an upper shelf. The current edition certainly exhibits no sign of either of these catastrophes. So far as we have tested their work, the learned editors have done it satisfactorily. Their task has been much heavier than mere procedural demands would appear to warrant, for there is, and always has been, a mass of references in the notes in *Bullen and Leake* to cases decided on substantive law. Thus account had to be taken not merely of amendments in the law of pleading, like the New Procedure under Order XXXVIIIa, but also of a good many cases reported since 1924. Such omissions as have been made deliberately are for the purpose of economy of space and they have not injured a book which must always be used in close conjunction with the *Annual Practice*; that work deals with the matter which used to be incorporated in the appendix to *Bullen and Leake*.

P. H. W.

The Governments of the British Empire. By A. Berriedale Keith, D.C.L., D.Litt., F.B.A. London: Macmillan & Co., Ltd. 1935. xxvii and 646 pp. (21*s.* net.)

In his latest contribution to the literature of Imperial Constitutional Law Professor Keith discusses the framework of the Imperial Constitution (Part I) in some 250 pages and devotes the remainder of the book to an account of the Governments of the Empire, including the United Kingdom. The treatment of the Dominions is of particular interest: Dominion status is first described; the special features of the separate Dominion Constitutions follow. It is clearly impossible to review the detailed accounts of particular constitutions which occupy Part II, but the concise summary of the governments of the whole Empire thus presented is particularly welcome.

The main interest in Part I lies in the full accounts given of imperial co-operation and consultation and of the foreign relations of the Empire. Despite the enumeration of the instances when the members of the British Commonwealth have been treated as separate States, both as members of the League of Nations and in foreign affairs generally, it is not yet time to assess with confidence their exact position in international society. The Dominions do not all assert their independence in foreign relations to the same extent. Constitutionally, notwithstanding the contention that the Parliament at Westminster has absolute supremacy, the autonomy of the Dominions is now assured and unity lies henceforth in concerted action by independent States.

The author claims, somewhat boldly we think, that he deals with the fundamental principles of administrative law, since his definition of constitutional law leaves no room for separate treatment of the former subject (p. 4). Yet his faith in the late nineteenth century interpretation of the rule of law is apparently unshaken (p. 237) and he still maintains that there is really nothing corresponding to *droit administratif*. Upon this it may be remarked that administration in practice is less a matter for judicial control than for control by administrative methods, and that few writers on the modern Constitution are not prepared to admit that in all but name we have in this country administrative law.

E. C. S. W.

District Councils. By H. W. Wightwick. Second edition. London: Stevens & Sons, Ltd. 1935. xlv and 604 pp. (15*s.*)

This is a convenient handbook of the powers and duties of Urban and Rural District Councils. The subject-matter is arranged in alphabetical order. So extensive is the scope of the subject that it has been found necessary to omit the law relating to Parish Councils, which bodies, though too often ineffective, possess considerable powers, should they decide to employ them. The book supplies the District Councillor with all the information he needs and may be compared with Stone's 'Justices' Manual', the indispensable guide for Justices of the Peace.

E. C. S. W.

International Adjudications (Modern Series). Edited by JOHN BASSETT MOORE. Vol. IV, xxvi and 200 pp.; Vol. V, xv and 502 pp.; Vol. VI, xxv and 418 pp. New York: Oxford University Press.

WE have now received three further volumes in the modern series of *International Adjudications* edited by Dr. John Bassett Moore and published by the Carnegie Endowment for International Peace. Volume IV deals with the mixed Commission under Article VII of the Jay Treaty of 1794 appointed to assess 'compensation for losses and damages caused by the violation of neutral rights, and by the failure to perform neutral duties'. It has, therefore, a topical bearing, and it has a special interest for Cambridge readers because it has been enriched by the discovery, by Mr. Gaskoin of Fitwilliam House, of a bundle of documents in the Public Record Office containing notes of cases decided in the Court of Admiralty and by the Lords Commissioners of Appeal in Prize Causes between 1790 and 1830 (see Gaskoin in *British Year Book of International Law*, 1923-24, pp. 78—89).

Volume V deals with the Spanish Spoliations, 1795, the French Indemnity, 1803, and the French Indemnity, 1831, including an account of the controversy that arose between the American and the French Governments regarding payment of the latter indemnity and the French plea that, though satisfied, the Convention had not yet received the approval of the legislature which was necessary to carry it into effect.

Volume VI deals with the 'Arbitration of the Title to Islands in Passamaquoddy Bay and the Bay of Fundy' by the mixed Commission set up under the Anglo-American Treaty of December 24, 1814.

No greater service can be rendered to the study of International Law than the publication of raw materials such as these, with the care and thoroughness which these volumes reveal, and each additional volume in this series increases our already heavy debt to Dr. John Bassett Moore and to the Carnegie Endowment.

A. D. McN.

Manual of the Law of Evidence: SIDNEY L. PHIPSON, M.A. Fifth edition. By ROLAND BURROWS, K.C., and C. M. CAHN, B.A. Sweet & Maxwell, Ltd. 1935. xlvii and 344 pp. (12*s.* 6*d.* net.)

THE increasing popularity of this book, in its successive editions, is well deserved. One might almost say that it has superseded all other elementary text-books, so general has its use become amongst students.

There are several improvements in this edition. The Introduction has been rewritten, is much fuller, and much more intelligible to the beginner in the subject. The text has been rewritten, and explained where necessary. The cases have been revised, unnecessary cases dropped, recent cases added; and a better distribution of cases, placing them immediately after the portion of text which they illustrate, has been adopted. One is surprised to find how greatly the Law of Evidence is built upon precedents; there are thirty-six pages of a Table of Cases. The

illustrating cases are placed in parallel columns, admissible and inadmissible; and it might be an advantage to explain the difficult ones more fully; also a case of the importance of *R.* v. *Woolmington* [1935] A. C. 462; 25 Cr. App. R. 72, deserves more than a casual mention. Perhaps the work is meant to be used with a book of Cases and Statutes, published by the same publishers.

An excellent book, at a reasonable price; and its price is not an indication of its value and usefulness.

H. B.

Annual Digest of Public International Law Cases. Being a selection from the Decisions of International and National Courts and Tribunals given during the Years 1929 and 1930. Edited by H. Lauterpacht, LL.D., Dr. Jur., Dr. Sc. Pol. London, New York, Toronto: Longmans, Green & Co. 1935. (42*s.* net.)

The Annual Digest has now reached its fifth volume, and we may be permitted to hope has become as 'hardy' as it is already indispensable. Not that experiments in form have ceased, for this year there is a welcome improvement in that, as far as possible, cases are reported in full in one place, and cross-references given elsewhere to the various points of law involved. No digest can be expected to be more than a ready guide to the full reports (and yet how often it is expected!), but the new practice undoubtedly helps the seeker to grasp the cases as a whole.

No less than 302 cases are reported in this volume, including six from the Permanent Court and some seventy from other international tribunals. Of these the Mixed Arbitral Tribunals established under the Peace Treaties supply the bulk, followed closely by the Claims Commissions established between Mexico and Great Britain, France and the United States. The cases from Special Tribunals include the award of the Lena Goldfields arbitrators.

The crop of cases arising out of the Great War is not yet exhausted, and unfortunately is becoming once again topical. Of special interest we may select the case of *Portugal* v. *Germany* (the Cysne), which affirms that reprisals are not admissible against neutrals. This is the great difficulty in the way of the full operation of Article 16 of the Covenant. Of interest also is the case of *Kiriadolu* v. *Germany*, in which it was held that the requirement of notification before bombardment contained in Article 26 of The Hague Regulations concerning Land Warfare and Article 6 of the same regulations concerning Warfare on Sea extends also to bombardment from the air—these Regulations being, not rules of an exceptional character, but applications of the general principle that the life and property of non-combatants must, so far as possible, be respected.

R. E. K.

Recht und Sittlichkeit. Von Rudolf Laun. Dritte erweiterte und vermehrte Auflage. Berlin: Verlag von Julius Springer. 1935. vi and 109 pp. (RM. 4.80.)

In 1924 the author delivered a rectoral address, entitled *Recht und Sittlichkeit*, at the University of Hamburg; and in 1927 this appeared, but with the text unaltered, in a second edition. In the present work this address, again unaltered, forms the first chapter. The remaining chapters, which are new, deal successively with the following topics:—*Die Autonomie des Rechts; die Positivität des Rechts; die Allgemeingültigkeit des sittlichen und rechtlichen Sollens; Volksrecht gegen Juristenrecht; die Trennung der Gewalten.* The author, now a member of the Law Faculty of the University of Michigan, has rightly retained the original title, *Recht und Sittlichkeit*, for this enlarged work, since in all its chapters he is concerned, in one way or another, with juristic and philosophical speculation regarding *Recht* (law) and *Sittlichkeit*, a term which may be defined, in the language of the late Lord Haldane, as 'the system of habitual or customary conduct, ethical rather than legal', or, in other words, 'those principles of conduct which regulate people in their relations to each other, and which have become matter of habit at the stage of culture reached, and of which, therefore, we are not explicitly conscious' (see 'Higher Nationality', 1913, pp. 22—26). In Professor Laun's book one of the main themes is the relationship between *Recht* and *Sittlichkeit*, an ancient problem which has caused much learned discussion and controversy from the time of Ihering to the present day; and to that problem the author has given his own solution. While it is impossible in the present short notice to enter into a consideration of Professor Laun's conclusions and of the reasoning upon which they are based, it may be remarked that, as a fresh and enlightened study of this problem, his closely-packed pages deserve a careful examination by jurists and philosophers. Students of Mr. C. K. Allen's chapters on Custom and Precedents, in his 'Law in the Making', may wish to compare Professor Laun's chapter on *Volksrecht gegen Juristenrecht* (pp. 81—102). On *Volksrecht* (folk-law) and *Juristenrecht* (jurists' law), see Allen, *op. cit.*, ed. 1927, pp. 69—85; and Vinogradoff, 'Collected Papers', 1928, vol. II, pp. 415, 420, 465 ff.

H. D. H.

The Causes of War and the Conditions of Peace. By Quincy Wright, Professor of International Law at the University of Chicago. Longmans, Green & Co. xi and 148 pp. 1935. (5*s.*)

This publication of the Graduate Institute of International Studies at Geneva is the product of a number of years' research at the University of Chicago, and is a reproduction of a series of lectures delivered by the author at that Institute in 1934.

The purpose of the book is rather to provide an outline for a study of the causes of war, and it represents the result of a series of approaches

to the problem by members of different Departments of the University of Chicago.

The lectures present the world in a series of four pictures, first as 'a system of material forces of varying magnitudes in a condition of relatively unstable equilibrium', secondly as 'a system of law defining the relations of legal persons by propositions systematically related to each other'. The third picture is of 'a community within which personalities communicating with each other in a variety of inter-penetrating groups, each combined by common symbols, are united as a whole by the symbol of the family of nations'. In the author's fourth picture, the world appears as 'a population of human individuals, each behaving according to his heredity and experience, as a result of which the population has spread over most of the world'.

After analysis through a large range of 'approaches', it appears that through public opinion alone can a natural proneness to war be mitigated, and this by means of 'central organization with wide powers of communication for education, especially for peace education'. The removal of the belief that war is inevitable does not seem possible until there ceases to exist any probability that war will serve any end, political, economic or cultural, for any state.

The Bibliography appended is remarkably complete, and provides references to sources for those who care to carry further this line of research.

Civilisation and the Growth of Law. By William A. Robson, Ph.D., LL.M., B.Sc. (Econ.), Barrister-at-Law, of Lincoln's Inn; Reader in Administrative Law in the University of London. Macmillan & Co., Ltd. 1935. xv and 354 pp. (12*s.* 6*d.*)

If, as the learned author confesses, 'the writing of this book has been a strange and exciting adventure', none the less will it prove so to the student who reads it. Its object is 'to depict the interactions between people's ideas about the universe on the one hand and the laws and government of mankind on the other'. The inter-relation and mutual influence upon each other of legal and political institutions, and the forces of Magic, Religion and Science, are considered with the ambitious aim of producing some synthesis.

Part I on the Origins of Law deals with the mutual influences of Law and Religion, and the later invasion of a rational element to sweep away ancient irrationalities such as serfdom, slavery, burning for witchcraft, and so on. It is, however, the wealth of illustration and the seeming 'universality' of the inquiry that are the stimulating values of the book. Dr. Robson adds another chapter to the discussion of the nature of Law, and appears to follow Professor Malinowski in flouting the suggestion that primitive tribesmen moved about 'in a sort of custom-bound trance'. Voluntary customs were, and still are, distinguished, in primitive communities, from law.

Part II is devoted to the Law of Nature, while Part III deals with

the Nature of Law. Both these parts are very readable, and while one cannot altogether agree with the author's apparent disagreement with the essence of the Austinian explanation of Law, it is perhaps due to inability of the reviewer completely to follow Dr. Robson's thought.

The Law of Fire Insurance. By SANFORD D. COLE, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1935. xvii and 157 pp. (6*s*. net.)

THE form of a digest, *i.e.*, the statement of rules followed by commentary and amplification has always seemed to us the most satisfactory to enable a student to obtain a clear grasp of a subject, and recent experience has strengthened this view. Until recently the questions on Conflict of Laws at the Solicitors' Final examinations were set from a book in this form. For examinations after November, 1935, another book has been substituted, whether because it is slightly shorter, or because of the tendency towards the academic and away from the practical which seems to be shown in recent policy of the Law Society, is not known. But students are undoubtedly finding the shorter and more rambling book harder.

In the book under review the law of fire insurance is stated in the digest form. The 115 pages of text are divided into an introduction and thirty-five sections, followed by extracts from judgments and explanatory notes. This is followed by an appendix containing notes on the law as to fire brigades, a form of standard policy, and the parts of the Assurance Companies Act, 1909, which relate to fire insurance. No mention is made of the Assurance Companies (Winding Up) Acts, 1933 and 1935.

Students for the Chartered Insurance Institute and other examinations should find the book most useful. It is exceptionally clear. It is stated on p. 22 that by Act of Parliament tenants for life and other limited owners of property must insure against fire. No authority is, however, given for this sweeping statement and we must take leave to question its accuracy.

Bawden v. *London Etc. Assurance Co.* [1892] 2 Q. B. 534 might have been mentioned in the section dealing with 'Disclosure by Agent'.

R. H. K.

The Law relating to Building Societies. By EDWARD ALBERT WURTZBURG, of Lincoln's Inn, Barrister-at-Law. Seventh edition. By G. W. KNOWLES, M.A., of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1935. xxxv and 376 pp. (£1 net.)

THERE are more than one thousand building societies, with assets amounting to more than £500,000,000, and with their activities every practising solicitor and millions of laymen—borrowers and investors—

are directly concerned. Few however have more than the most vague ideas of the constitution and powers of these associations. This work therefore supplied a considerable need in providing for reference in convenient form a compendium of the law on the subject, and we are glad to welcome an up-to-date edition.

We cannot pretend to the special qualifications required adequately to criticize a work of this specialized character, but we have read it with interest and have been unable to find any errors of substance. On p. 17, n. (*n*), 'certificate of the Barrister' should be 'certificate of the Registrar', and there are two spelling misprints on p. 37 and another on p. 67.

The book is quite comprehensive and appendices contain the Building Societies Acts and Regulations and various forms.

We were glad to notice that the common but unsatisfactory practice of accepting a letter from a bank as a release of an equitable charge held by it is condemned by the editor of this work.

R. H. K.

The Law of Landlord and Tenant. By W. A. Holdsworth. Forty-ninth edition. By E. A. Jessel, B.A., of the Inner Temple, Barrister-at-Law. London: George Routledge & Sons, Ltd. 1935. xii and 188 pp. (3*s.* 6*d.* net.)

To landlords and tenants without legal training this little book should be a great help in the solution of many of the disputes which are apt to arise when the amount at issue seems too small to justify a lawyer's fee. It is not of course a lawyer's book—the treatment of the various parts of the law is too brief for the professional lawyer and very few references to cases are given. It is, for example, clearly impossible adequately to deal with the Rent Restriction Acts in three pages, and throughout a harsh critic would have little difficulty in finding minor inaccuracies of the kind which are almost inevitable in a work of this character.

The first edition appeared in 1885 and the forty-eighth more than thirty years ago, so the task of the editor has not been a light one, particularly in the selection of the new matter to be included, but he has performed it well and has incorporated the general effect of all the statutory provisions which have made important alterations in this branch of the law.

There are 144 pages of text, 35 pages of precedents, and a 2-page glossary of legal terms with simple explanations of their meaning. The professional reader who might find difficulty in accepting the accuracy of some of them is disarmed by the footnote to the effect that the explanation of legal terms 'is entirely of a *popular* character'.

R. H. K.

Executors and Administrators. By N. E. Mustoe, M.A., LL.B., of Gray's Inn, Barrister-at-Law. Second edition. By the Author. With executorship accounts by W. A. Kieran, A.S.A.A. London: Butterworth & Co. (Publishers), Ltd. 1935. xxxv and 290 and [19] pp. (12*s*. 6*d*. net.)

First published in 1933, a second edition of this book in 1935 indicates that it met with a favourable reception at the hands of students, for whom it is primarily intended. Examples of estate accounts are now given and there is an appendix of questions and exercises. Some of the questions are taken from papers set by the Law Society.

The work is very comprehensive, including within its scope wills, probate and administration, intestate succession, death duties and conversion as well as the topics discussed in the chapters on administration of assets in the standard text-books. Necessarily the treatment of some of these subjects—notably solemn form probate—is very brief, and omissions have occasioned one or two inaccuracies, but the clear style of the book and the use of different types make it an admirable introduction for students for all examinations. In fact they will find within these pages nearly all they are likely to be asked on the subject.

Most of the important recent cases have been included, though we sought in vain *Re Shee* [1934] Ch. 345, on the application of the *Allhusen* v. *Whittell* rule to payments made to a person to take an assignment of onerous leaseholds, and *Re Newman* [1930] 2 Ch. 409 and *Re Warren* [1932] 1 Ch. 442, on conversion.

Re Letherbrow [1935] W. N. 34, and *Re Holden* [1935] W. N. 52, have rendered inadequate the treatment of ancillary administrations in Chapter III.

R. H. K.

Slater's Mercantile Law. Ninth edition. By R. W. Holland, O.B.E., M.A., M.Sc., LL.D., of the Middle Temple, Barrister-at-Law, and R. H. Code-Holland, B.A., of the Middle Temple, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1935. xlii and 643 pp. (7*s*. 6*d*.)

The prophecy of the learned reviewer of the eighth edition of Slater's Mercantile Law (published in 1933) that a further edition would shortly be called for has been proved correct, and the present edition is in fact the fourth to be published in a period of only six years. The book is very useful, especially to students, as a method of finding quickly the effect of the leading principles and authorities in the various branches of mercantile law comprehensively and accurately stated. The changes in the law effected by the Law Reform (Miscellaneous Provisions) Act, 1934, and the Arbitration Act, 1934, have been incorporated in the text, and in an Addendum the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, have been shortly set out. At least three recent decisions, *viz.*, *Kleinwort, Sons & Co.* v. *Associated Automatic Machine Corporation* [1934] W. N. 65; *Trollope & Sons* v. *Martyn Bros.* [1934] 2 K. B. 436; and *London Jewellers* v. *Attenborough*; *Same* v.

Sutton [1934] 2 K. B. 206 have been added to the collecion of leading cases, but it is questionable how far such a case as the last of these is to be recommended for study as a leading authority upon the principles applicable to the law on the Transfer of Property. The book is, however, of the greatest value as an introduction and as a general guide, comprising, as it does, so much accurate and useful information in so small a space and for so small a price. The general arrangement of the book and the index are both excellent.

P. H. D.

The Soviet Union and International Law. By T. A. Taracouzio. New York: The Macmillan Co. 1935. xvi and 530 pp. (31*s.* 6*d.*)

This work evidently owes much to the aid of the Bureau of International Research of Harvard University and Radcliffe College, and is indeed a valuable contribution to the history of International relations.

The purpose of the author is to set out the principles of International Law as applied by the Soviet State up to September, 1934. The first two chapters explain clearly the Communist conception of International Law. Later chapters deal thoroughly with Sovereignty, Territory, Diplomacy, Treaties, Consular Service, Pacific Settlement of International Disputes, and finally, War. Persons are studied in two chapters, the first dealing with Nationality and Citizenship, and incidentally with the interesting question as to voluntary and, more especially, involuntary loss of citizenship. The second Chapter covers the Status and Legal Capacity of Foreigners.

The author shows how the Soviet government has been forced to modify in practice much of its theory, in order to enter into international relations which soon were seen to be as essential as they were unavoidable. A degree of conformity to accepted principles of international law was found to be necessary. One would note this with more satisfaction if it did not appear that this conformity is merely a temporary concession to immediate expediency. The author cautiously avoids any definite opinion as to this.

Very useful are the excellent Appendices containing copies of various Treaties and Decrees of the Soviet government. From the strictly legal point of view, this book supplies the counterpart to 'The Soviets in World Affairs' by Louis Fischer (2 vols. 1930) which traverses International Relations.

International Organization. By R. Yorke Hedges, LL.D., of Gray's Inn, Barrister-at-Law; Diplômé de Haute Études Internationale (Geneva); Senior Lecturer in Law in the University of Manchester; sometime Rockefeller Fellow in Social Sciences at Harvard University. Sir Isaac Pitman & Sons, Ltd. 1935. x and 212 pp. (10*s.* 6*d.*)

This is by no means the first book on this important subject, but it is the most succinct. It is not a treatise upon which the earnest Honours

student can solely rely without supplementary reading, but even he will find it the very book he needs when revising. Those reading for the Historical Tripos, Part II, will also find this a good investment. Indeed so clearly is it written that it may be recommended to all students who wish conveniently and authoritatively to improve their knowledge of the organization of international relations, the problems raised, and suggestions as to the means by which solutions can be found.

It must not be thought from what is said above that this is merely a 'cram-book'. Emphatically it is not. But it is so comprehensive and concise that it has the invaluable quality of suiting the expert reader as well as the man in the street.

The work is divided into three parts. Part I is concerned with The Development of International Organization, and emphasizes the interdependence of states and the need for the evolution of international government. Part II deals with the Organization of Peace, and deals with the methods available for the settlement of international disputes. The word 'War' does not appear in the index! Part III covers the field of International Co-operation. The Mandates System, the Protection of Minorities and other instances of this are succinctly described.

The appendices will prove useful to the general reader, and while it seems unnecessary nowadays to reprint the text of the Covenant, it is convenient to find examples of Mandates and the text of the somewhat neglected Pact of Paris. There is also a brief but adequate Bibliographical Note appended.

Dr. Hedges is to be congratulated on having filled so admirably an undoubted need.

J. O. J. M.

International Law. By L. Oppenheim. Vol. II: Disputes, War, and Neutrality. Fifth edition. Edited by H. Lauterpacht. London: Longmans, Green & Co. 1935. lii and 782 pp. (45*s.* net.)

Dr. Lauterpacht's admirable work in the editing of the periodical Digests of Cases involving International Law and his many other valuable contributions to the literature of the subject make him the natural choice as editor of the new edition of Oppenheim's work, Professor McNair being unable, owing to other demands on his time, to undertake it. Apart from a very thorough revision of the references to the literature on the subject and the footnotes supplementary to the text, probably the most striking contribution of new matter is the very careful examination, in Chapter III of Part I, of the effect of the Pact of Paris on traditional doctrine as regards war, and the comparison with the articles of the Covenant of the League. This exposition is most clear although the outcome is disappointing to those who look forward to the rule of law overcoming force in international affairs. On the other hand, we think that Dr. Lauterpacht's estimate of the effect of the Treaty on the law of Neutrality (292 (h) and (i)) is open to argument. A full discussion would, of course, transcend the limits of our space, but it is hardly conceivable that in practice the customary rules would not gradually be modified to the detriment of an aggressor without resort necessarily to

acts which would be specifically termed 'reprisals'. Other matters to which attention should be directed are the section dealing with the Revision of the Statute of the Permanent Court (25*aca*) and that on the use of gases (113).

D. T. O.

Constitutional Law. By E. C. S. Wade and G. Godfrey Phillips. Second edition. By E. C. S. Wade. London: Longmans, Green & Co. 1935. xxviii and 553 pp. (21*s.* net.)

In reviewing the first edition of this work we expressed the view that it would take the leading place among text-books on the subject. This has been amply justified by the event and it may safely be said that no student of constitutional law can now, if he is wise, dispense with a careful perusal of this work at the outset of his studies. In this edition, for which Dr. Wade is solely responsible, a new Part (VII) on the Law of Public Administration has been added and the introductory chapter on Local Government (Part VI) has been rewritten and now contains an admirable presentation of the history and principles of this important subject in a concise form. The sections relating to India and the Self-Governing Dominions have naturally received considerable modification and amplification in view of recent developments. It is hardly necessary to add that all cases and enactments of recent date have been noted with Dr. Wade's usual care and accuracy.

D. T. O.

Principles of the Law of Libel and Slander. By Wilfrid A. Button, B.A., Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1935. xxiii and 255 pp. (12*s.* 6*d.*)

There was a real need for a book of modest dimensions on this important subject, which would be suitable for the use of students. Mr. Button has produced such a book, and has set out lucidly and accurately the leading principles, and illustrated them with a wealth of verbatim extracts from the law reports. There is a practical tone about this work, and at the end of most of the chapters there are specimen pleadings and the relevant rules of procedure. There is also an appendix of statutes. The author makes it clear in his preface that the book is designed for students, and that for the intricate details of this difficult subject the practitioner will still consult Gatley, Blake-Odgers and Fraser. At p. 14 the author deals with the novel point as to whether a gramophone record is libel or slander. Since the book appeared, there has been some illuminating discussion of this matter in the 'Law Quarterly Review', Vol. LI, 1935, pp. 282, 573-4. Small misprints appear at pp. 4, note (*l*), for *Bown* read *Bower*; 61, l. 31 *a* read *at*. There is no need of a better recommendation for this excellent text-book than to quote Lord Justice Greer's observation in the Foreword, . . . 'A good foundation for an adequate and complete knowledge of the English law of defamation'.

T. E. L.

Elements of Insurance Law. By M. P. Picard, LL.B., Bacon Scholar of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1935. xii and 178 pp. (7*s.* 6*d.*)

The author has well satisfied the demand for a small book for students which sets out the principles of insurance law applicable to life, fire and other non-marine risks. The beginner has here a well-arranged text-book which adequately explains the essential principles of insurance. Over two hundred cases are cited; the statements of fact are models of compression, and there are copious quotations from judgments. There is one appendix of Forms, and another dealing with the leading cases and setting out in concise form the principles for which they are authorities. At p. 104, it might have been added that section 47 (1) L. P. A., 1925 applies subject to '(a) any stipulation to the contrary contained in the *contract* . . . (c) the payment by the purchaser of the proportionate part of the premium from the date of the contract', section 47 (2) *ibid.* The important decision of *Monk* v. *Warbey* is duly considered at p. 133. The whole work is admirably done, and should prove a boon to students faced with insurance as a special subject.

T. E. L.

Public Speaking. By Archibald Crawford, K.C. London: Pitman & Sons, Ltd. 1935. viii and 250 pp. (7*s.* 6*d.*)

This interesting and instructive book is based upon some thirty years' experience of the author both in Court and on the political platform—it is the autobiography of one who has been 'through the mill'. It was not intended to set forth principles, but to offer suggestions on broad lines derived from the author's experience and his observation of eminent orators. He discourages the learning of speeches by heart, and recommends the 'mental picture' method of preparation. There is an illuminating comparison and discussion of the oratory of a number of advocates and politicians, and every chapter offers practical help. It is fascinating and extremely readable, encouraging and extremely useful to all who wish to acquire competence in the art of public speaking in its manifold forms.

T. E. L.

Wege und Irrwege juristischen Denkens. Kleine Beiträge zur Theorie des Rechts. Von Dr. Wilhelm Fuchs. Berlin: Verlag Dr. Emil Ebering. 1936. 212 pp. (RM. 8.40.)

This volume, which appears in the series of 'Studies in Legal Science' (*Rechtswissenschaftliche Studien*) edited by a group of University Professors, including G. Anschütz, P. Oertmann, and P. Rehme, contains three contributions to the theory of law (pp. 5—126) together with many notes (pp. 127—212). In these essays Dr. Fuchs has dealt with certain fundamental concepts on philosophical lines; and in giving us much of his own thought he has at the same time provided us with an instructive

introduction to the ideas of other scholars of the recent past, such as Binding, Kohler, and Hohfeld, and of the present-day, such as Heck, Jahrreiss, Laun, Medicus, Kluckhohn, Nelson, Kelsen, Kocurek, and Pound. The notes are useful for two reasons. They not only furnish references to recent literature, but embody the critical comments of the learned author. Of the many topics considered by Dr. Fuchs attention may be drawn to two. Thus, in the first study, entitled *Rechtswissenschaft und Einheitswissenschaft* (pp. 5—34), his purpose is to show that although the sentence *Verae iurisprudentiae methodus nulla alia nisi scientiae naturalis est*, which, following Brentano's thesis, postulates the unity of science, is valid only on the basis of a true theory of natural law, nevertheless it does not exclude, but on the contrary includes, the idea of a positive law, if that be thought of as a true science of nature having law, in the sense of justice, as its purpose (see pp. 127 ff.). Another topic of special interest is 'Enactment and Duty' (*Verfügung und Verpflichtung*; pp. 70—126) in which Dr. Fuchs not only examines the problem of the logic embodied in the German Civil Code (*Bürgerliches Gesetzbuch*), but makes at the same time a contribution to the study of the basic legal ideas of right (*Recht*), duty (*Pflicht*), capacity (*Fähigkeit*), and burden (*Last*).

H. D. H.

Russell on the Power and Duty of an Arbitrator and the Law of Submission and Awards. Thirteenth edition. By Edmund Cave, formerly a Master of the Supreme Court, and Ernest Wetton, of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1935. lvi and 730 pp. (42*s.*)

In consequence of the passing of the Arbitration Act, 1934, it has been found desirable to bring out a new edition of Russell on Arbitration, and it can be said at once that this, the thirteenth edition, will be found to be of even more value as the leading authority upon this difficult subject than its predecessors. The most important part is that dealing with the new Act (pp. 449—485) where the provisions of the Act are set out and comments made upon the changes that have been made in the earlier law, and of particular value are the notes to the important section 9 dealing with the statement of an award in the form of a special case for the decision of the Court, and the power given to the Court to order an award to be so stated by the arbitrator. So far as can be seen, reference has been made to all the important recent decisions and many early cases which have lost their former value have been eliminated. The Arbitration (Foreign Awards) Act, 1930, and the provisions of foreign systems of law applicable to arbitration (pp. 502—531) will be found of great value in assisting lawyers and others, particularly those concerned in shipping and foreign trade, at reaching a speedy conclusion as to their rights and obligations in foreign countries. It can hardly be expected that the exposition in this book of the law of foreign arbitration should be exhaustive, but so often the important thing is to arrive at a decision in such matters with the utmost speed, and the pages referred to seem

to be admirably adapted to meet the difficulties which commonly arise with great suddenness in this sphere.

P. H. D.

Annual Survey of English Law, 1934. London: Published for the London School of Economics and Political Science by Sweet & Maxwell, Ltd. 1935. xxviii and 308 pp. (10*s.* 6*d.*)

It is a pleasure and a profit to review this number, for in method, scope and treatment it maintains the high standard of its predecessors, and no other publication of its size gives so accurate and comprehensive an account of the law of 1934. Property and Conveyancing, Mercantile and International Law occupy a prominent place. In Contract there has been a number of important decisions on general problems, *e.g.*, *Foley* v. *Classique Coaches, Ltd.* (uncertainty in contract and restraint of trade), *Harmer* v. *Armstrong* (benefit of third parties), *The Arpad* (measure of damages). In Tort, there is nothing outstanding except 'The liberative effect of the *Snail Case*', *e.g.* in *Wilchik* v. *Marks & Silverstone* and *Brown* v. *Cotterill.* Under their appropriate headings we note *Todrick* v. *Western National Omnibus Co.* (easements); *Andrews* v. *Singer*; *Cammell Laird* v. *Manganese Bronze and Brass Co.*; *London Jewellers, Ltd.* v. *Attenborough* (sale of goods); *R.* v. *Donovan*; *Maxwell* v. *Director of Public Prosecutions* (criminal law and evidence). No case of importance is omitted, and there is no better method of refreshing one's memory of the law of 1934 than by studying this 'Survey'.

T. E. L.

Amos and Walton: Introduction to French Law. Oxford: Clarendon Press. 1935. 393 pp. (21*s.*)

Amos and Walton's book is a compendium of French law, and a very good compendium indeed. The authors have had a long and valuable experience of French law, and their statements are extremely reliable, so far as they have not already been invalidated by supervening legislation, in particular the new decrees of October 30, which dealt with various matters (Parental Authority, Registration of Deeds, Bills of Exchange and Cheques). Outside the field covered by that new legislation, the book will prove a valuable guide to current French law. The mistakes in it are trivial; *e.g.*, the use of the words 'successeurs irréguliers' at p. 18. The main difficulty for an English reader will most probably lie in the frequent use by the authors of French legal expressions, which an English lawyer might easily misunderstand, such as the word 'Jurisprudence', which is used in many places in reference to the 'decisions of the Courts' in accordance with its French meaning (see pp. 239, 249, 256, etc.). That is all the more to be regretted because there is at present no good French-English legal dictionary.

A more serious criticism however, relates not so much to what the book is as to what it is not; for it is not an introduction to French law, as one would suppose it to be. It tells an English reader what are the views of French law on particular questions, but it does not tell him how to approach any question which is not dealt with by the book (as for instance, questions of criminal law or of commercial law or of conflict of laws), and it does not enable him to find his way in the vast and difficult fields of French laws, of French legal literature, and of French judicial records. Developments in the book dealing with the question of the authority of judicial precedents or of legal text-books or of 'travaux préparatoires' in France (pp. 7 *et seq.*) are undoubtedly accurate, but insufficient for that purpose.

It is to be hoped that both authors will follow up what is a good compendium of French Civil Law with a book which is really wanted nowadays—a good Introduction to the study of French law.

R. D.

The Law and Custom of the South African Constitution. By W. P. M. Kennedy and H. J. Schlosberg. Oxford University Press. 1935. xxxix and 640 pp. (36*s*.)

The happy combination in authorship of Professor Kennedy from the senior Dominion and Mr. Schlosberg, a lawyer from the Union, has produced a full and critical exposition of the organs of government in South Africa. A concise account of the early constitutional history of the Four Provinces is included, together with the events which culminated in the enactment of the South Africa Act, 1909, by the United Kingdom Parliament.

The parts of the book dealing with the government of the natives and the external relations of the Union are among the most valuable features of the book. The Canadian professor approaches more dispassionately than the least biased of local authors the native problem which confronts the European ruling majority. Criticism of administration of native affairs is not spared. The same influence is doubtless responsible for the frequent comparisons between provincial government in South Africa—a unitary State—and Federal Canada. In many respects the Constitution of the Union is the most interesting among the Dominion Constitutions. Moreover the Union has implemented in full the legal consequences of the Statute of Westminster with the full concurrence of His Majesty's Government in the United Kingdom to the great advantage of both countries.

We would in particular commend the following features of this book: the Judicial System, which shows the concentration of inferior jurisdiction in trained magistrates; Native Administration, taking the form of executive despotism (Crown Colony government) in a State which itself enjoys responsible government; Inter-Imperial and other external relations, concerning the progress of the British Commonwealth in general and South Africa in particular in a wholly admirable way.

E. C. S. W.

The British Year Book of International Law, 1935. Sixteenth year of issue. Humphrey Milford, Oxford University Press. vi and 248 pp. (16*s.* net.)

The present issue opens most appropriately with a sympathetic and appreciative memoir of the late Professor Pearce Higgins, to whose initiative and energy no small part of the success of the British Year Book may fairly be attributed. Professor Manley Hudson contributes a paper on the Members of the League of Nations which is most useful in assisting to a clear understanding of the difficulties in the present working of the machinery of the League. Professor Quincy Wright's article on 'The Effect of Withdrawal from the League upon a Mandate' deals with a question which may, before long, give rise to serious international controversies; and Mr. Norman Bentwich's paper on 'The League of Nations and Refugees' discusses at some length the unsatisfactory state of international arrangements and conventions for dealing with the large bodies of exiles who have become the victims of the political controversies and upheavals following on the termination of the Great War. There are two most interesting articles dealing with the subject of Conflict of Laws. Mr. J. G. Foster makes a critical survey of the English Rules, pointing out defects in the present state of the law; and Professor Mendelssohn Bartholdy treats of the delimitation of Right and Remedy in cases of Conflict of Laws as a study of comparative law. There is a very thoughtful paper by Mr. J. Walter Jones on the Theory of International Law; and the other papers contained in this issue maintain the usual high standard of writing. It is hardly necessary to add that the valuable Notes and records of Decisions, Opinions and Awards for the last year, and the Reviews of recent publications, make the Year Book essential to every English student of international law.

D. T. O.

Powers of Attorney. By F. Bower Alcock, of Gray's Inn, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1935. xxxiv and 291 pp. (21*s.* net.)

This book fills a real need for an up-to-date account of the law relating to powers of attorney. The subject is not an easy one to treat in such a way as to hold the interest of a reader and is rendered more difficult by lack of authority, the many doubts in the law of agency generally and uncertainties as to how far many principles of agency are applicable to powers of attorney; but the author has very competently performed his task.

The treatment of *Drew* v. *Nunn* (1879) 4 Q. B. D. 661 and *Yonge* v. *Toynbee* [1910] 1 K. B. 215 is not very convincing, and the statement of the effect of bankruptcy seems incomplete without some discussion of sections 45 and 46 of the Bankruptcy Act, 1914, which are not mentioned.

We should also have welcomed a full discussion of the rather difficult section 124 of the Law of Property Act, 1925, and at least mention should have been made of the requirement, under section 4 of the Bills of Sale Act, 1878, of registration of a power of attorney to take possession of chattels as security for a debt.

The passages relating to married women (pp. 65-7), though accurate

when written, have since been rendered obsolete by Part I of the Law Reform (Married Women and Tortfeasors) Act, 1935.

Taken as a whole, this is a sound piece of work, and it should prove of considerable help to practitioners.

R. H. K.

The Housing Act, 1935. By T. J. Sophian, of the Inner Temple, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1935. ix and 217 pp. (12*s.* 6*d.*)

'This book does not profess to be a complete work on Housing. It is intended to explain the important changes which have been brought about by the Housing Act, 1935.' In these words the author indicates the limited scope of his book. Within those limits, however, Mr. Sophian has performed his task admirably. In fifty-four pages of introduction he draws attention to the outstanding provisions of the Act; the rest of the book is a reprint of the Act itself with notes to each section and references to other enactments. The 1935 Act deals with overcrowding in an entirely new way and also gives to local authorities additional powers of ordering the demolition of buildings. Thirty sections deal with financial provisions and there are twenty-nine sections of miscellaneous amendments of existing Acts. This book should be useful to those who have to keep abreast of the rapid changes which take place in this branch of the law.

The League of Nations' Covenant. By K. R. R. Sastri, M.A., M.L., Advocate, Madras. Madras: Devi Press. 1935. 133 pp. (Rs. 2, or 3*s.* foreign.)

This compact and handy little book can best be described by a quotation from the Foreword by the Rt. Honourable V. S. Srinivasa Sastri, P.C., C.H. He says: 'It is based on a careful study of existing authorities and brings together excerpts of value to elucidate and sustain the positions taken by the author.' What precisely are the positions taken by the author is not easy to discover, but the first part of the quotation is accurate. Students will find the book a useful compendium of opinions on the subject under discussion.

Freedom in the Modern World. By Jacques Maritain. Translated by Richard O'Sullivan, K.C. Sheed & Ward. 1935. viii and 192 pp., with two Appendices. (6*s.*)

The law student will hardly find a place on his bookshelves for this book. Nevertheless for the philosophically minded, particularly him who is concerned with the problem of the mental and religious freedom of the individual in the State, the book seems indeed interesting.

The author is a Thomist, and, in fact, the work is an interpretation and an extension of the philosophy of St. Thomas Aquinas in the light of the place of Free Will in our modern world.

Diplomatic Correspondence of the United States. Inter-American Affairs, 1831—1860. Selected and arranged by William R. Manning, Ph.D. Carnegie Endowment for International Peace. xxxii and 735 pp. ($5.)

This volume of documents, selected and arranged by the Editor of 'Diplomatic Correspondence of the United States Concerning the Independence of the Latin American Nations', to which this is a sequel, is Volume VI of the series, and deals with the correspondence with France, Ecuador, and the Dominican Republic during the period.

To the historian it is full of interest, and the student of International Law will find data concerning the Monroe Doctrine, Blockade, and, more especially, as to Recognition of new States.

An interesting reference to the still-continued dispute between Great Britain and Argentina as to their rival claims to the Falkland Islands will be found at p. 437 in a dispatch dated February 4 of 1832.

The Road Traffic Acts, 1930—1934, and Orders. Arranged, Annotated and Explained by Geraint Rees and Arthur G. Dennis. London: Solicitors' Law Stationery Society, Ltd. 1934. lxxi and 646 pp. (30*s.*)

This is a practitioners' book on the road traffic law of to-day. The ample introduction may profitably be read by all concerned with user of the roads. The rest of the work is unsuitable for detailed review in this Journal, but should serve as an entirely adequate guide to the practitioner on one of the most urgent of legal questions. The first-named of the joint editors recently passed through the Cambridge Law School with conspicuous success.

E. C. S. W.

English Constitutional Documents, 1307—1485. Edited by Eleanor C. Lodge and Gladys A. Thornton. Cambridge University Press. 1935. xxv and 430 pp. (12*s.* 6*d.*)

This is a collection of original documents relating chiefly to administrative history and covering the period which intervenes between Stubbs' *Select Charters* and Tanner's *Tudor Constitutional Documents.* The period is one which is at present neglected so far as the subject of Constitutional History finds a place in the syllabus for the Law Tripos Examinations. Of particular interest are the chapters relating to the Household, Wardrobe and Chamber, and to Justice. In Part III Local Government receives a full measure of treatment. For the purpose of an adequate appreciation of the editors' work reference must be made to the historical periodicals.

E. C. S. W.

World Court Reports. A Collection of the Judgments, Orders and Opinions of the Permanent Court of International Justice. Edited by MANLEY O. HUDSON, Member of the Permanent Court of Arbitration at The Hague; Bemis Professor of International Law, Harvard Law School. Vol. II, 1927—1932. Washington: Carnegie Endowment for International Peace. 1935. xxi and 870 pp. ($3.)

THIS collection of Reports, of which the first volume was noticed in our last issue, will be as necessary to all students of International Law as the Law Reports to English and American lawyers. Each case is preceded by an explanatory note and is followed by an Annex containing a list of the documents and other material filed by the parties in support of their respective contentions. The editing leaves nothing to be desired.

Other books and publications received (some of these will be reviewed in the next issue):—

Handbook of the Cambridge Law School, 1935—1936. Cambridge University Press. viii and 148 pp. (2*s.* 6*d.*)

Trustees—and Irish Securities. London: F. C. Mathieson & Sons. October, 1935. 12 pp. (6*d.*)

Supplement to the Law of Income Tax. Sixth edition. By E. M. KONSTAM. London: Stevens & Sons, Ltd. and Sweet & Maxwell, Ltd. 1935. 31 pp.

Die doppelte Gerichtsbarkeit in den Vereinigten Staaten von Nordamerika. By DR. F. B. SIEVEKING. Hamburg: Hans Christians Druckerei und Verlag. 1935. 123 pp.

La Clause d'Inalienabilité ou 'Restraint on Anticipation' dans le régime des biens entre époux en Droit Anglais. By BERTHE BERNOT. Paris: Librarie Arthur Rousseau. 1934. 144 pp. (25 *fr.*)

Die Ultra-Vires-Lehre im englischen Privatrecht. Von DR. C. SCHLINK. Berlin and Leipzig: Walter de Gruyter & Co. 1935. 183 pp. (RM. 6.)

Rogers on Elections. Vol. III. Municipal and other Elections and Petitions. Twenty-first edition. By J. LHIND PRATT. London: Stevens & Sons, Ltd. 1935. 364 pp. (£1 net.)

Contribution in Fire Insurance. By H. S. BELL. London: Stevens & Sons, Ltd. 1935. xvi and 279 pp. (15*s.* net.)

Patents and Gebrauchsmuster in International Law. Pacot Publications, Madison, Wisconsin. 1935. 538 pp.

The Australian and New Zealand Society of International Law. Proceedings.—I. Melbourne University Press in association with Oxford University Press. 1935. xxvi and 188 pp. (10*s.* 6*d.* net.)

Industrial Germany. By HERMANN LEVY. Cambridge: at the University Press. 1935. x and 245 pp. (12*s.* 6*d.* net.)

Prologue to Nomostatics. By G. H. JAFFIN. Reprinted from Columbia Law Review. January, 1935. 32 pp.

La Clause 'Dollar-or'. By M. DOMKE. First and second editions. Paris: Les Éditions Internationales. 1935. First edition, 100 pp. Second edition, 105 pp. (20 *fr.*)

Le Pouvoir du Juge International de statuer 'ex aequo et bono'. Par MAX HABICHT. Paris: Recueil Sirey. 1935. 96 pp.

Das Problem des Völkerrechtlichen Angriffs. Von W. G. HERZ. Leiden: A. W. Sijthoff's Uitgeversmij. N.V. 1935. 183 pp. (3.60 *fl.*)

Germany's Equality of Rights as Legal Problem. By VIKTOR BRUNS. Berlin: Carl Heymann's Verlag. 1935. 32 pp.

The Gold Clause. Second edition. By A. PLESCH. London: Stevens & Sons, Ltd. 1936. vii and 119 pp. (7*s.* 6*d.* net.)

Un Crime Passionel devant La Justice Anglaise. By J. DUHAMEL and J. DILL SMITH. Paris: Les Écrivains Français. 1934. 315 pp. (20 *fr.*)

Intestate Succession Tables. London: National Guarantee and Suretyship Association. 1935. 10 pp.

Chicago Bar Record. Published by the Chicago Bar Association. Vol. XVI, No. 5, March—April, 1935; No. 6, May, 1935. Vol. XVII, No. 2, December, 1935.

Geistiges Eigentüm. Internationale Zeitschrift für Theorie und Praxis des Urheberrechts und Seiner Nebengebiete. Band 1, Heft 2. Juli—August, 1935. Leipzig: Verlag für Recht und Gesellschaft A.G.

Questions and Answers on Hindu and Mahommedan Law. By J. C. DURAI and C. E. MILES. London: Stevens & Sons, Ltd. 1935. vii and 91 pp. (6*s.* net.)

Supplement to Snell's Equity. Chapter XXV. Married Women. London: Sweet & Maxwell, Ltd. 1935. (1*s.* net.)—A very complete revision of the chapter on Married Women which will prove most useful to students as a clear and succinct statement of the recent changes effected by the Act of 1935.

Craies on Statute Law. Fourth edition. By W. S. SCOTT, K.C. London: Sweet & Maxwell, Ltd. 1936. lv and 568 pp. (37*s.* 6*d.* net.)

Bell Yard. The Journal of the Law Society's School of Law. No. 15, May, 1935.—Articles of considerable interest are included on 'The Genesis of the Settled Land Act Powers', by the Principal; 'Equitable Easements', by GEOFFREY CROSS, and 'Is Consideration necessary for Equitable Assignments of Choses in Action?', by G. W. KEETON. No. 16, November, 1935.—Articles of interest are 'Some Problems in the Conflict of Laws', by PROF. BERRIEDALE KEITH, and 'Rules against Remoteness of Limitation', by H. G. HANBURY.

Collective Security. An Inaugural Lecture. By A. D. McNair. Cambridge University Press. 1936. 42 pp. (1*s.* 6*d.* net.)

The Symbols of Government. By T. W. Arnold. London: Oxford University Press. 1935. vi and 278 pp. (11*s.* 6*d.* net.)

Georgetown Law Journal. Vol. XXIII, Nos. 3 and 4, March and May, 1935. Vol. XXIV, Nos. 1 and 2, November, 1935, and January, 1936.

Tulane Law Review. Vol. IX, Nos. 3 and 4, April and June, 1935. Vol. X, Nos. 1 and 2, December, 1935, and February, 1936.

University of Toronto Law Journal. Vol. I, Nos. 1 and 2, 1935-6. University of Toronto Press. ($2.50 the vol.; $1.50 the number.)

Boston University Law Review. Vol. XIV, No. 4, November, 1934. Boston University School of Law. ($2 per annum; 65 cents the number.)

Res Judicatae. The Magazine of the Law Students' Society of Victoria. Vol. I, No. 1, September, 1935. Melbourne: Butterworth & Co. (Aust.), Ltd. (2*s.*)

World Trade: Journal of the International Chamber of Commerce, July—August, 1935. Resolutions adopted by the Eighth Congress of the International Chamber of Commerce, Paris, June 24—29, 1935. International Chamber of Commerce, Paris.

Trade in Our Day. By F. H. F. van Vlissingen, President of the International Chamber of Commerce. Bankruptcy and Rights of Creditors. Paris Congress, 1935. International Chamber of Commerce, Paris.

Weekly News Sheets issued by the Publicity Department of the Ministry of Foreign Affairs, United Mexican States. Nos. 11, 12, 17, 18, 39, 40.

Di alcuni recenti aspetti del Diritto Penale Tedesco in materia di misure di sicurezza. By M. G. De Rossi. Modena: Società Tipografica Modenese. 1935.

Undertakings in regard to the Pacific Settlement of Disputes. Year 1934. Geneva: League of Nations, Information Section.

Daily Record, Baltimore, November 6, 1935. Report of the Circuit Court of Baltimore City in the matter of Citation for Contempt of Court to Ben. Weintraub, Attorney-at-Law.

The Transitional Provisions of the Property Acts, 1922 *and* 1925, and the provisions relating to the making of title to land after 1925. By Ronald Cozens-Hardy Horne, B.A., of Lincoln's Inn, Barrister-at-Law. London: Butterworth & Co., Ltd., Bell Yard, Temple Bar. 1935. xxvii and 193 pp. (12*s.* 6*d.* net.)

The Institution of Property. By C. Reinold Noyes. New York: Longmans, Green & Co. 1936. xiv and 645 pp. ($7.50.)